ıe Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

THE CITY OF LITTLETON,

Petitioner,

v.

Z.J. GIFTS D-4, L.L.C., a Colorado Limited Liability Company d/b/a CHRISTAL'S,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 2, 2003

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168 pp

QUESTIONS PRESENTED

This Petition involves a challenge by Respondent to the judicial review provisions of The City of Littleton's City Code, Title 3, Chapter 14, Section 8 ("the Ordinance"). The Ordinance governs the licensing of adult entertainment establishments within the City of Littleton. When a license is denied pursuant to this Ordinance, its provisions provide for "prompt access to judicial review" through Colorado's mandatory certiorari review procedure under Colo.R.Civ.P. 106(a)(4) (review in the nature of certiorari). This procedure was recently invalidated by the Tenth Circuit in *Z.J. Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220 (10th Cir. 2002). The Tenth Circuit Court of Appeals instead required that cities in Colorado guarantee that judges will render a "prompt judicial decision on the merits" when an adult business challenges an adverse licensing scheme.

This Petition seeks the resolution of a near complete division in the Circuits regarding the sufficiency of prompt access to an independent judicial officer when an adult business license is denied for violations of content-neutral time, place, and manner regulations. This question requires the Court to revisit the plurality decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990). The present case asks this Court to resolve the conflict so municipal governments, seeking to regulate the negative secondary effects of sexually oriented businesses, may meet the correct standard for providing judicial review of licensing decisions.

QUESTIONS PRESENTED – Continued

The Questions Presented are:

For the purposes of reviewing content-neutral sexually oriented business licensing decisions, is prompt judicial access sufficient or must a city somehow provide a prompt judicial decision?

If prompt access to a court of law is insufficient, then what must a city do to provide sufficient safeguards under the First Amendment?

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PETITION FOR A WRIT OF CERTIORARI

The City of Littleton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's opinion (App. 1-39) is published at *Z.J. Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220 (10th Cir. 2002). The Tenth Circuit's order denying rehearing *en banc* (App. 68-69) is unpublished. The District Court's opinion and order (App. 40-67) is unpublished.

JURISDICTION

The Tenth Circuit denied Petitioner's timely petition for rehearing *en banc* on February 5, 2003. (App. 68-69) This court has jurisdiction under 28 U.S.C. § 1254(1) to review the Circuit Court's decision on a writ of certiorari.

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

Article II, Section 10 of the Colorado Constitution and Article III of the Colorado Constitution provide:

Article II, Bill of Rights

Section 10. Freedom of speech and press.

No law shall be passed impairing the freedom of speech; every person shall be free to

speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.

Article III
Distribution of Powers

The powers of the government of this state are divided into three distinct departments, – the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Reproduced in the appendix is Colo. R. Civ. P. 106, (App. 70-74) and the original and amended versions of Chapter 14 of Littleton's Municipal Ordinance (Section 3-14-1 *et seq.*). (App. 75-116)

STATEMENT OF THE CASE

This case raises an important issue as to whether a content-neutral time, place and manner regulation, which provides prompt access to judicial review, satisfies constitutional requirements.

Background

The City of Littleton's ("Littleton's") Municipal Code, originally passed in 1993, set forth a variety of zoning and

licensing requirements with regard to sexually oriented businesses. (App. 75-111) Before passing its licensing and zoning[1] Ordinance, the City Council considered evidence which addressed the adverse secondary impact of adult businesses, including increased crime, decreased property values and urban blight. (App. 75-82) Prior to the Tenth Circuit's decision, Littleton had amended its Ordinance in an attempt to comply with previous changes in the law. (App. 112-116)

Littleton's Ordinance contains zoning restrictions which mandate where in the City sexually oriented businesses can operate. The Ordinance provides that adult businesses may operate in Littleton's Industrial, or I-1 and I-2 zone districts, subject to certain distance requirements. Respondent Z.J. Gifts D-4, L.L.C. d/b/a Christal's (hereafter "ZJ") is open and operating in Littleton's B-2 (business) zoned district, a zoned district where the use is not permitted.

ZJ's Claims Below

Shortly after it opened, without applying for or having been denied a license, ZJ brought an action under 42 U.S.C. § 1983, challenging Littleton's adult business Ordinance as unconstitutional and seeking declaratory and injunctive relief, as well as attorneys' fees and damages.

Despite ZJ's arguments to the contrary, the District Court found that ZJ's was an adult business. (App. 54-55)

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[1] The zoning issues at stake in the trial court are not at issue here, and, therefore are described only peripherally.

ZJ argued that the Ordinance was unconstitutional because it infringed on ZJ's First Amendment rights. ZJ further argued that Littleton did not have sufficient avenues of communication for sexually oriented businesses. Littleton argued that its Ordinance was constitutional in all aspects.

On cross motions for summary judgment, the District Court granted Littleton's motion and found the Ordinance constitutional in its entirety. (App. 40-67) The Tenth Circuit affirmed the District Court's holdings that ZJ's was an adult business (App. 12, fn. 6), and the Tenth Circuit affirmed the District Court's holding that Littleton's locational restrictions were constitutional and that there were ample avenues of communication open for adult businesses in Littleton. (App. 33-38)

Licensing

ZJ also brought constitutional challenges with regard to several aspects of the Ordinance's licensing provisions. The Littleton Ordinance requires sexually oriented businesses to obtain a license in order to operate. The Tenth Circuit rejected all of ZJ's claims regarding its challenges to the licensing provisions, save three. (App. 15-33) Two of the claims were premised upon the Ordinance's failure to specify a time limit within which the City had to act with regard to the timing of fingerprinting and photographing, and the time frame within which a statement would be provided by the City Zoning Officer. (App. 20-23) The Tenth Circuit found those two provisions unconstitutional, but severable (App. 24), and Petitioner did not seek rehearing on them.

With regard to the third licensing provision, related to the granting or denial of a license, the Tenth Circuit noted that the Circuits were divided over the definition of the "prompt judicial review" requirement as adopted by this Court in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228, 107 L. Ed. 2d 603, 620, 110 S. Ct. 596, 606 (1990). The Tenth Circuit overruled the Colorado Supreme Court in holding that prompt judicial review means that there must be a guarantee of a prompt decision.

Under Littleton's Ordinance there are eight narrow grounds upon which a license can be denied[2] and the

[2] Section 3-14-8 Application/Denial of License provides that after an application has been submitted, the City Clerk has thirty days to approve or deny the license. The Clerk may deny an application based on one or more of eight specified grounds as follows: [t]he applicant is under twenty-one years; [t]he applicant has made a false statement upon the application or gave false information in connection with an application; [t]he applicant or any holder of any class of stock, or a director, officer, partner, or principal of the applicant has had an adult business license revoked or suspended anywhere within the State of Colorado within one year prior to the application; [t]he applicant has operated an adult business which has determined to be a public nuisance under state law or this Code within one year prior to the application; [a] corporate applicant is not in good standing or authorized to do business in the State of Colorado; or [t]he applicant is overdue in the payment to the City of taxes, fees, fines, or penalties, assessed against him/her or imposed against him/her in relation to an adult business; [t]he applicant has not obtained required sales tax licenses; [t]he applicant has been convicted of a specified criminal act. (App. 96) Specified criminal act is defined in the Ordinance as sexual crimes against children sexual abuse, rape or crimes connected with another adult business, including distribution of obscenity, prostitution, pandering or tax violation. (App. 88 & 112, § 3-14-2 original definitions and as amended)

All of these licensing provisions were upheld by the Tenth Circuit which found that such provisions did not involve or permit unbridled discretion on the part of licensing officials. (App. 29, fn. 13)

Ordinance contains very specific provisions governing the appeal process which provides access to and the guarantee of judicial review in the event of a denial.[3] (App. 96-97 & 114) Pursuant to the Ordinance, an applicant has twenty

[3] Section 3-14-8(B) (as amended App. 114) provides as follows: In the event that the City Clerk denies a license, he/she shall make written findings of fact stating the reasons for the denial, and a copy of such decision shall be sent by certified mail to the address shown in the application within ten (10) days after denial. An applicant shall have the right to a hearing before the City Manager as set forth in subsection 3-14-11(C) of this Chapter. A written request for such hearing shall be made to the City Manager within twenty (20) days of the date of the denial of the license by the City Clerk. This hearing shall be held within thirty (30) days from the date a timely request for hearing is received by the City Manager and shall follow all the relevant procedures set forth for a suspension or revocation of a license contained in subsection 3-14-11(C) of this Chapter.

1. Section 3-14-8(B) (as amended App. 114) (1)(2)(3) (App. 97) At the hearing referred to above, the City Manager shall hear such statements and consider such evidence as the Police Department or other enforcement officers, the applicant, or other party in interest, or any other witness shall offer which is relevant to the denial of the license application by the City Clerk. In such cases where specified criminal acts are in issue, the provisions of C.R.S. § 24-5-101 shall control.

2. If the City Manager determines that the applicant is ineligible for a license per Subsection (A) hereof, he/she shall issue an order sustaining the City Clerk's denial of the application, within twenty days after the hearing is concluded, based on findings of fact. A copy of the order shall be mailed to or be served on the applicant at the address of the application.

3. The order of the City Manager made pursuant to paragraph 2 above shall be a final decision and may be appealed to the District Court pursuant to Colorado Rule of Civil Procedure 106(a)(4). Failure of an applicant to timely follow the limits specified above constitutes a waiver by him/her of any right he/she may otherwise have to contest the denial of his/her license application.

days to appeal a denial of a license to the City Manager who must hold a hearing within thirty days. In the event the appeal is denied, then the applicant may seek review in the State District Court pursuant to Colorado Rule of Civil Procedure 106(a)(4) for certiorari review of a quasi-judicial administrative decision.

The District Court found that the Rule 106 review procedure providing for prompt judicial review met constitutional standards. (App. 63-66) The Tenth Circuit reversed the District Court holding that prompt judicial review requires the City to ensure that a court of law will issue a "prompt judicial decision" on the merits of an adult business' appeal of an adverse decision. (App. 32-33) The Tenth Circuit offered no guidance as to how a municipality could craft such a guarantee, given the inherent limitations on legislative authority over judicial acts.

Littleton filed a petition for rehearing *en banc* on the narrow issue of what process is necessary to satisfy the prompt judicial review requirement in this context, where the government does not pass judgment on the content of an applicant's speech. (App. 117-132) The petition was denied on February 5, 2003. (App. 68-69)

Eight Circuits have now considered the sufficiency of prompt judicial review in the context of content-neutral licensing ordinances. Four have reached a conclusion contrary to the Tenth Circuit. This Court now has an opportunity to clearly define the requirement of prompt judicial review in time, place and manner regulations of expressive conduct.

On these issues, Littleton hereby respectfully submits its Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

This case presents important and compelling issues of constitutional law which warrant this Court's intervention. The Circuits which have addressed the meaning of "prompt judicial review" are hopelessly deadlocked both as to result and reasoning. The conflicting decisions on this issue illustrate the confusion which has spread through the lower courts, spawned by this Court's plurality decision in *FW/PBS*. The issue will not go away. With time the schism has only become increasingly confusing as municipalities struggle to comply with an undefined and moving target in an attempt to regulate adult businesses.[4] The conflicting and incongruous results have bred additional litigation and have resulted in unwarranted and unnecessary attacks on adult business ordinances that have frustrated the efforts of municipalities to regulate the admittedly "serious problems" caused by sexually oriented businesses. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976), citing, *Berman v. Parker*, 348 U.S. 26, 75, 99 L. Ed. 27, 75 S. Ct. 98 (1954), and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986). The well established constitutional concept of analyzing content-neutral adult

[4] For at least ten years the definition of "prompt judicial review" has been the subject of divergent decisions at both the state and federal levels, commencing with the First Circuit's 1993 decision in *Jews for Jesus v. Massachusetts Bay Transportation Auth.*, 984 F.2d 1319 (1st Cir. 1993), and culminating most recently in a Sixth Circuit decision in *Deja Vu of Cincinnati, L.L.C. v. Union TownShip Board of Trustees*, 2003 U.S. App. Lexis 7720 (April 24, 2003) where that court noted that the Circuit Courts are currently divided about what constitutes "prompt judicial review."

business ordinances under the time, place and manner test has been steadily eroded.

Four Circuits, the First, Fifth, Seventh and Eleventh,[5] which have considered the issues upon which this Petition is predicated, found that the requirement of "prompt judicial review" is satisfied under the First Amendment where there is prompt access to a court of law following a denial of a license to operate. Four Circuits, the Fourth, Sixth, Ninth[6] and now the Tenth, have held that "prompt judicial review" requires a prompt judicial decision. The decisions of these Circuits have resulted in invalidating numerous local ordinances and placing local governments in a "Catch 22" with respect to their efforts to regulate sexually oriented businesses. Either municipalities must allow sexually oriented businesses to operate

[5] *See, TK's Video, Inc., v. Denton County*, 24 F.3d 705 (5th Cir. 1994); *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (*en banc*), *cert. denied*, 511 U.S. 1085, 128 L. Ed. 2d 464, 114 S. Ct. 1837 (1994); *Jews for Jesus v. Massachusetts Bay Transportation Auth.*, 984 F.2d 1319 (1st Cir. 1993); and *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999), *cert. denied*, 529 U.S. 1020, 146 L. Ed. 2d 315, 120 S. Ct. 1423 (2000). There is also an indication that the Second Circuit in *Beal v. Stern*, 184 F.3d 117 (2d Cir. 1999) would follow the reasoning and logic adopted in the line cases above in noting, but without deciding, that prompt access to judicial review in state courts would be constitutionally sufficient. The Colorado Supreme Court in *City of Colorado Springs v. 2354, Inc.*, 896 P.2d 272 (Colo. 1995) has also concluded that the requirement of prompt judicial review is satisfied through Colorado's expedited judicial review procedure as set forth in Colo.R.Civ.P. 106(a)(4)(V) and Colo.R.Civ.P. 106(a)(4)(VIII).

[6] *See, 11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988 (4th Cir. 1995) (*en banc*) *cert. denied*, 502 U.S. 819, 116 L. Ed. 2d 50, 112 S. Ct. 76 (1991); *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884 (6th Cir. 2000); and *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998).

with impunity or risk adopting licensing ordinances and becoming entangled in the confusing legal morass generated by the divergent state and federal court decisions. These risks include being subjected to damage claims as well as 42 U.S.C. § 1988 attorneys' fees.

This Court previously granted certiorari in *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 151 L. Ed. 2d 783, 122 S. Ct. 775, 781 (2002)[7] and in *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 148 L. Ed. 2d 757, 121 S. Ct. 743 (2001)[8] to resolve the circuit split in defining "prompt judicial review." Neither case, however, for different reasons, reached this issue. This case provides an ideal opportunity for this Court to finally clarify whether prompt access to the judiciary sufficiently safeguards an adult business's interests.

The question in *Thomas* and *Waukesha* involved the issue of whether a prompt judicial determination of any appeal from a denial of a license or permit is constitutionally required or whether the First Amendment is satisfied by affording unsuccessful licensing applicants prompt access to judicial review.[9]

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[7] In *Thomas*, this Court granted certiorari, recognizing that the Courts of Appeals were divided as to whether the requirement of prompt judicial review means a prompt judicial determination or prompt commencement of judicial proceedings. *Thomas*, 534 U.S. at 316.

[8] In *Waukesha*, this Court granted certiorari on the sole question of whether the guarantee of prompt judicial review must accompany an adult business licensing scheme and whether it means a prompt judicial determination on the merits of a permit denial or simply prompt access to judicial review. *Waukesha*, 531 U.S. at 280.

[9] In *Thomas*, the application was for a park permit, and in *Waukesha* the application was for an adult business license. In *Waukesha*, this

(Continued on following page)

In *Thomas*, this Court found that censorship was not at issue and that a *Freedman* analysis was not necessary. This Court reiterated that time, place and manner regulations contain adequate standards so long as they cabin an official's discretion and render it subject to effective judicial review. *Thomas*, 534 U.S. at 322-323. Petitioner contends that identical safeguards are sufficient in the context of content-neutral adult business regulations. To be sure, the Littleton Ordinance differs from the ordinance in *Thomas* because the Littleton Ordinance is directed at sexually oriented businesses, but this feature merely demonstrates adherence to this Court's requirement that such ordinances be "narrowly tailored" to effect only that category of [businesses] shown to produce the unwanted secondary effects, thus avoiding the flaw [of overbreadth] that proved fatal to the regulations in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 L. Ed. 2d 671, 101 S. Ct. 2176 (1981), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 45 L. Ed. 2d 125, 95 S. Ct. 2268 (1975).

This case provides an ideal vehicle for this Court to finally resolve these issues and eliminate the uncertainties which have placed municipalities in the untenable position outlined above. This case squarely presents the issue upon which the lower courts are split.

In addition, while some of the Circuits that have analyzed this issue have considered the sufficiency of "access to" judicial review within the context of common law certiorari, the Littleton Ordinance specifically provides for and mandates judicial review under Rule 106 of

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Court failed to reach the issue upon which certiorari was granted because the Court found that the issue was moot.

the Colorado Rules of Civil Procedure. This provision, which provides for certiorari review of quasi-judicial decisions, is relied upon to provide prompt judicial review not only by Littleton, but also by many other municipalities in Colorado.[10] Colo.R.Civ.P. 106 is a mandatory review in the nature of certiorari and provides for an expedited review.[11] Although the crevasse dividing the courts centers upon the definition of prompt judicial review, the state and federal courts are further fractured based upon whether the subject ordinance contains a provision on its face for judicial review, whether the ordinance provides for access to the judiciary or whether a judicial hearing is guaranteed, and whether common law certiorari practice, statute, or writs of mandamus are sufficient to avoid constitutional infirmities. Colorado's Rule 106 provision guarantees immediate access to an independent judiciary and it should provide appropriate protection in cases like this where censorship is not at issue and governmental interests are "undeniably important." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000).

As the Colorado Supreme Court explained:

> The provisions of C.R.C.P. 106(a)(4)(V) and C.R.C.P. 106(a)(4)(VIII) establish procedures for both a stay of the effect of an adverse decision and expedited review thereof. Under these circumstances, we conclude that C.R.C.P. 106 and the Ordinance provide adequate safeguards to ensure that any impermissible prior restraint on a particular applicant's protected rights of free speech may be remedied promptly by judicial intervention.
>
> We also conclude that C.R.C.P. 106(a)(4)(V) and C.R.C.P. 106(a)(4)(VIII) provide "an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial." *FW/PBS*, 493 U.S. at 229 (plurality opinion). The provisions of C.R.C.P. 106(a)(4)(VIII) specifically authorize a district court to accelerate or continue any action, and, as indicated, C.R.C.P. 106(a)(4)(V) authorizes a district court to stay any decision to deny, suspend, or revoke a license. These provisions are adequate to withstand the plaintiffs' facial challenge to the Ordinance.

City of Colorado Springs v. 2354, Inc., 896 P.2d 272, 284 (footnotes omitted)

Thus, Littleton's Ordinance, on its face, provides prompt access to judicial review of content-neutral licensing decisions and thereby adequately safeguards the rights of adult businesses.

The Tenth Circuit, in its ruling, much like the other Circuits who have required a prompt judicial decision, has effectively imposed the third *Freedman*,[12] requirement –

[10] A review of approximately fifty Colorado municipal codes reveals at least thirty-two municipalities (or approximately 60%) rely on Colo.R.Civ.P. 106(a)(4) or procedures substantially similar to Littleton's Ordinance with respect to licensing schemes in the context of adult businesses and Colo.R.Civ.P. 106(a)(4) provisions are also utilized in other municipal licensing schemes in which free speech is implicated. (App. 135-136 & 138).

[11] Colo.R.Civ.P. 106(a)(4)(VIII) (App. 70-74).

[12] In *Freedman*, this Court set forth three procedural safeguards to ensure expeditious decisionmaking by a motion picture censorship board, which the *FW/PBS* Court outlined as follows: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor

(Continued on following page)

which this Court held did not apply in these circumstances – by requiring the City to "bear the burden" upon a license denial. Although the Tenth Circuit's opinion does not address how cities can comply with its "prompt judicial decision" requirement, other "prompt judicial decision" courts have required cities to give offending adult businesses temporary or provisional licenses to operate during judicial review. Thus, the incentives discussed in *FW/PBS*, 493 U.S. at 229-230, are reversed and the adult business itself have every incentive to drag its heels and delay the determination on the merits.

The *Freedman* requirements were designed for a content-based censorship scheme, not for a content-neutral licensing scheme. The Tenth Circuit's holding is in direct contradiction to this Court's holding in *FW/PBS* and further demonstrates the extent to which basic, long standing jurisprudential concepts are either being ignored, misunderstood or misapplied because the tests and standards have become completely muddled.

In *FW/PBS* this Court recognized the significant differences between censorship schemes and content-neutral licensing schemes. This Court explicitly declined to shift the burden of going forward and the burden of proof to the government in a licensing scheme and it set forth in detail the basis for its rationale. *FW/PBS*, 493 U.S. at 230. After delineating those differences, this Court applied only a portion of the *Freedman* requirements to a content-neutral licensing scheme.

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must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. *FW/PBS*, 493 U.S. at 227.

The *FW/PBS* Court explained that the licensing scheme at issue did not "present the grave dangers of a censorship system," and that a censorship system creates special concerns for the protection of speech, because "the risks of freewheeling censorship are formidable." *FW/PBS*, 493 U.S. at 229 (citing, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559, 43 L. Ed. 2d 448, 459, 95 S. Ct. 1239, 1247 (1975)). Censors engage in direct censorship of expressive material, whereas in a licensing scheme the government does not exercise discretion by passing judgment on the content of protected speech. *FW/PBS*, 493 U.S. at 229-230. Censors reach subjective conclusions regarding speech, whereas licensing officials review the general qualifications of the applicant, a review which is objective in nature. The burden of proceeding with litigation is placed upon censors because otherwise the private party may be deterred from challenging any denial, in which case a denial might be tantamount to complete suppression of speech. Licensing applicants, on the other hand, have much more at stake because obtaining a license is the key to maintaining a business and therefore there is every incentive for the applicant to pursue any denial. *Id.* Moreover, licensing laws impinge only incidentally upon protected speech, because such laws are aimed at the secondary effects of such speech, rather than the content of speech. *11126 Baltimore Blvd., Inc.*, 58 F.3d at 1003 (Niemeyer, J., concurring in part and dissenting in part).

The Court in *FW/PBS* did not specifically address the issue of whether prompt judicial review would be satisfied in a content-neutral licensing scheme if the subject ordinance contained a specific provision – such as Colorado's Rule 106 procedure – because the subject ordinance in *FW/PBS* contained neither the possibility of, nor an avenue for judicial review.

FW/PBS did not require a "prompt judicial decision" and did not place the burden of initiating litigation or the burden of proof, once in court, on the City. Citing to *Freedman*, Justice O'Connor referred to the second *Freedman* prong in the following manner: "expeditious judicial review of that decision must be available." *FW/PBS*, 493 U.S. at 227. Justice O'Connor further stated that there must be the "possibility of" or an "avenue for" prompt judicial review. *FW/PBS*, 493 U.S. at 228-29. Notably absent from her opinion was any requirement that there be a "prompt judicial decision." The essence of the safeguard is in the availability of the review. Here, the Tenth Circuit, by requiring a prompt judicial decision, has conflated the standards traditionally used to analyze a content-based censorship scheme onto a content-neutral licensing scheme, and it has also shifted the burden of obtaining judicial review to the government, thereby reinstituting *Freedman's* third prong and applying it within the context of a content-neutral licensing scheme.

The *Renton* and *Young* Courts recognized the inherent value and importance which should be ascribed to the right of municipalities to regulate, through zoning and licensing schemes, the character of a city, using content-neutral time, place, and manner regulations. At the very least, the Tenth Circuit's decision in this case creates significant impediments and dangers for cities who attempt to regulate sexually oriented businesses.

Moreover, municipalities simply cannot assure that an independent judiciary will provide an expedited decision. Such a requirement fails to take into account the Separation of Powers Doctrine. Article III of Colorado's Constitution divides the powers of government into three distinct, co-equal branches, and directs that "no person or

collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others." Colo. Const. Art. III.

The Colorado Supreme Court discussed this principle in the case of *In the Interest of J.E.S.*, 817 P.2d 508 (Colo. 1991). The Court reaffirmed long standing jurisprudence that while the three departments of government must co-operate and complement each other, they may not interfere with or encroach on the authority of the other. "It is the genius of our government that the courts must be independent, unfettered, and free from directives, influence, or interference from any extraneous source." *Id.* at 511.

Nevertheless, this unworkable requirement has led to the invalidation of almost all adult business regulatory schemes in Colorado. By imposing on municipalities a fundamentally impossible duty to guarantee judicial action, the Tenth Circuit has unreasonably restricted the ability of Littleton and other cities, at least in Colorado, to have a workable regulatory licensing scheme for sexually oriented adult businesses. The unrealistic nature of this requirement has not been lost on other courts:

> In demanding this greater assurance, *Freedman* and *Baby Tam & Co.* may impose an impossible burden on the City. The City lacks the authority to prescribe a specified time when a state or federal judicial officer must render a decision. It has been suggested that the California Legislature would do so – at least with respect to state judicial officers – but even the state's authority is doubtful.

Mai Lee Le v. City of Citrus Heights, 1999 U.S. Dist. Lexis 13477 at 23 (E.D. Cal. 1999) (unpublished).

In *Mai Lee Le*, the Legislative Counsel of California asserted that even a state law requiring a prompt decision after a petition for writ of mandamus, seeking judicial review of a license denial, would likely violate the separation of powers doctrine. But the impossibility of the requirement did not dispose of its potency:

> In sum, *Freedman* and *Baby Tam and Co.* insist on a procedural safeguard that neither the City nor the State of California may have the power to provide. Nonetheless, those decisions – *however impractical they may be* – are the law.

Id. at 24 (*emphasis supplied*).

The First Amendment does not require such impossible results that plainly infringe on the independence of the judiciary and threaten the very purposes behind the separation of powers doctrine. The First Amendment does not require that municipalities grope for solutions which may not work[13] or forego regulation of adult businesses. The decisions of the Circuits requiring a "prompt judicial decision" have also had the effect of requiring that provisional licenses be given to adult businesses in violation of regulations that advance substantial government interest and are "not at all inherently related to expression." *Pap's*

[13] *See, Deja Vu of Cincinnati, L.L.C. v. Union TownShip Board of Trustees,* 2003 U.S. App. Lexis 7720 (April 24, 2003) (the Sixth Circuit held that a temporary permit given during judicial review was not able to save the municipality from the requirement that it guarantee a judge's prompt determination of the merits of an adult businesses's challenge).

A.M., 529 U.S. at 291 (2000) (plurality opinion) (quoting, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 115 L. Ed. 2d 504, 111 S. Ct. 2456 (1991) (Souter J., concurring in judgment)).

The Tenth Circuit's decision also assumes that state judges will forsake the duties of their office by refusing to render a prompt decision. Judges in the courts of the State of Colorado have the same duty to apply the protections of the United States Constitution as do federal judges. It must be assumed that a judge hearing a Colo.R.Civ.P. 106 review will recognize an obligation to proceed promptly and exercise the power to grant a stay, to expedite the determination or provide such other temporary relief as may be appropriate.

The Tenth Circuit decision also assumes that Littleton officials charged with licensing decisions should not be trusted. "[A]dult businesses are controversial, and the possibility exists that licensing officials might allow their personal views on the morality of sexually explicit entertainment to sway a decision on an application." (App. 31)

The Tenth Circuit essentially articulated fears that local licensing officials would exceed their authority and view the Ordinance as a "subterfuge for censorship." (App. 31) This theme is inherent in the decisions of the other Circuits that have required a prompt judicial decision. Yet this Court has never endorsed such a supposition. Rather, this Court has consistently held that courts must not presume bias, bad faith, or *ultra vires* action on the part of city officials. Indeed, the required presumption as to public officials is that "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15, 71 L. Ed. 131, 47 S. Ct. 1 (1926);

United States v. Armstrong, 517 U.S. 456, 134 L. Ed. 2d 687, 116 S. Ct. 1480 (1996).[14]

Finally, the requirement to have a prompt judicial decision seems to create the absurd result of favoring the free speech rights of sexually oriented business over such things as core political speech. Long established First Amendment principles have virtually been turned upside down by recognizing fewer restrictions and providing greater protections for speech which is associated with sexually oriented businesses, which have traditionally enjoyed only the outer perimeter of First Amendment protections, than those enjoyed by core political speech. As noted by Justice Stevens writing for the Court in *Young*:

> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lessor magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see

[14] Moreover, in this case, Littleton officials perform acts which are essentially ministerial in nature and cannot be argued to be presumptively invalid. As noted by the Tenth Circuit, none of the eight specific reasons to deny a license involved discretion on the part of the licensing official. (App. 29, fn. 13)

> "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.

Young, 427 U.S. at 70.

Yet the Tenth Circuit's decision has now effectively elevated sexually oriented speech above core political speech.

In *Thomas*, this Court found that a permit which regulated the time, place and manner of core political speech satisfied First Amendment principles. This Court analyzed *Freedman* and found that *Freedman* was inapposite because the licensing scheme at issue in *Thomas* was not subject matter censorship, but rather was a content-neutral time, place, and manner regulation. Indeed, as noted by this Court, the ordinance did not authorize a licensor to pass judgment on the content of speech and none of the grounds for denying the permit have anything to do with what the speaker might say.

Littleton's Ordinance is directly akin to the ordinance in *Thomas*, in that it does not give authorities unbridled discretion to deny a license. Nonetheless, the Tenth Circuit's decision has given sexually oriented businesses the more stringent protections afforded under *Freedman*. This has the dual effect of giving core political speech less protection than sexually oriented speech and treating content-neutral licensing schemes like content-based censorship schemes, although the two concepts have always been treated differently.

CONCLUSION

Under the current state of the law, municipalities are stuck between the proverbial rock and the hard place. The Circuits are hopelessly divided and whether a city can regulate adult businesses by licensing depends more on which Circuit the city is in rather than on whether the regulatory scheme meets the standards set by the Constitution.

This Court should resolve the issue and provide the guidance necessary to permit cities to perform their duty to mitigate the adverse secondary effects of adult businesses. Such guidance would not only resolve the uncertainty which currently exists, but it would help reduce a significant source of litigation and avoid the chill that 42 U.S.C. § 1988 exposure places on governments when they are required to act without guidance at their peril.

For these reasons, Littleton believes that certiorari review by this Court is warranted and compelling, and respectfully requests that its Petition herein be granted.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Z. J. GIFTS D-4, L.L.C., a Colorado Limited Liability Company, doing business as Christal's, Plaintiff-Appellant, v. CITY OF LITTLETON, an Incorporated Home Rule Municipal Corporation, Defendant-Appellee.	No. 01-1220

Appeal from the United States District Court for the District of Colorado (D.C. No. 99-N-1696)

(Filed Nov. 18, 2002)

Michael W. Gross (Arthur M. Schwartz with him on the brief) of Schwartz & Goldberg, P.C., Denver, Colorado for the Plaintiff-Appellant.

J. Andrew Nathan (Heidi J. Hugdahl with him on the brief) of Nathan, Bremer, Dumm & Myers, P.C. Denver, Colorado for the Defendant-Appellee.

Before **BRISCOE**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **LUCERO**, Circuit Judge.

LUCERO, Circuit Judge.

This case raises several First Amendment issues, including one in which the circuits are substantially divided: namely, the extent to which prompt judicial review must be assured in adult-business licensing cases. Plaintiff Z.J. Gifts D-4, L.L.C. ("ZJ") brought an action under 42 U.S.C. § 1983 challenging the City of Littleton's ("City's" or "Littleton's") adult business ordinance as unconstitutional, seeking declaratory and injunctive relief, attorney's fees, and damages. The district court granted summary judgment to the City. We have jurisdiction under 28 U.S.C. § 1291, and we reverse in part and affirm in part.

I

In 1993, the City passed an ordinance requiring businesses that specialize in adult entertainment or merchandise to obtain licenses, and restricting those businesses to certain areas of Littleton. Before passing its ordinance, the City Council heard testimony and reviewed reports from other cities concerning deleterious effects of adult businesses on property values and on crime rates.

In the fall of 1999, ZJ opened its store, known as Christal's, on South Broadway in Littleton. Prior to the opening of Christal's, the City informed the owner of the property on which Christal's was located that adult businesses were not permitted at this South Broadway location. In late August 1999 – shortly before Christal's opened – ZJ filed a § 1983 suit against the City seeking monetary, declaratory, and injunctive relief. ZJ's complaint alleged that Littleton's ordinance was unconstitutional because,

among other things, it infringed ZJ's First Amendment rights. ZJ also alleged that it did not intend to operate an "adult business establishment" as defined in Littleton's ordinance. (1 Appellant's App. at 11.)

On cross-motions for summary judgment, the district court ruled in favor of the City, concluding that ZJ was covered by Littleton's ordinance and that the ordinance was, in its entirety, constitutional. After the district court's decision in this case and during the briefing for this appeal, the City amended its ordinance, clarifying certain corporate disclosure requirements and changing an age restriction for adult businesses that do not offer live entertainment. Littleton, Colo., Ordinance 13 (2001) (codified at Littleton, Colo., City Code § 3-14-2, -5, -8, -16 (2002)).

II

Both as originally enacted and as amended, Littleton's ordinance has two primary functions: (1) it requires all adult businesses within Littleton to obtain licenses to operate within the City's borders, and (2) it restricts those businesses to certain sections of the City and requires that they not locate within a minimum distance of other specified sites.

Among the adult businesses covered by Littleton's ordinance, Christal's would most likely qualify as an "adult bookstore, adult novelty store, or adult video store." Littleton, Colo., City Code § 3-14-2. A commercial establishment falls into this category if, as judged by percentage of stock-in-trade, revenue, or advertising, it is primarily devoted to the sale of materials that are characterized by the depiction or description of "specified sexual activities"

or "specified anatomical areas," regardless of whether the establishment has other business purposes. *Id.* "Specified anatomical areas" are further defined as: "(A) Less than completely and opaquely covered human genitals, pubic region, buttocks, anus or female breasts below a point immediately above the top of the areolae; or (B) Human male genitals in a discernibly turgid state, even if completely and opaquely covered." *Id.* "Specified sexual activities" are defined to include masturbation, fondling of the genitals and other specified areas, excretory functions, human genitals in a state of "sexual stimulation, arousal or tumescence," and "normal or perverted" sex acts. *Id.*

No adult business covered by Littleton's ordinance may operate within five-hundred feet of a church, school, child-care facility, public park, massage parlor regulated by local ordinances, or community correctional facility. *Id.* § 3-14-3. Adult businesses also may not operate within one-thousand feet of each other or a massage parlor regulated by state law. *Id.* In addition, multiple adult businesses may not operate within the same structure. *Id.*

Under Littleton's ordinance, operation of an adult business within the City requires a license. Among other things, a license application must indicate or provide: names of all owners, managers, and employees of the business; information about whether the applicant has had an adult-business license denied, revoked, or suspended by any jurisdiction; an indication whether the applicant has adult-business licenses from other jurisdictions; the address, driver's license number, and social security number of the applicant and all owners, managers, and employees; a floor plan for the proposed business; a written statement by the City's Zoning Officer that the proposed location is in compliance with the ordinance; and

a statement of whether an owner, manager, or employee of the business has been convicted of specified criminal acts.[1] *Id.* § 3-14-5. Certain specified persons must also be fingerprinted and photographed by the Police Department. *Id.*

After an application has been submitted, the City Clerk has thirty days to approve or deny the license. *Id.* § 3-14-8. The Clerk may deny an application for one or more specified reasons, including: the applicant is under twenty-one years old; the applicant has made a false statement on the application; the applicant or any owner has had an adult-business license revoked or suspended within Colorado in the past year; the applicant has operated an adult business deemed to be a public nuisance in the past year; a corporate applicant is not in good standing or authorized to conduct business in Colorado; the applicant is overdue in any city taxes, fees, fines, or penalties assessed in relation to an adult business; the applicant has failed to obtain the required sales-tax license; or the applicant has been convicted of specified criminal acts. *Id.* Specified criminal acts for the purposes of the ordinance are defined as: "Sexual crimes against children, sexual abuse, rape or crimes connected with another adult business, including distribution of obscenity, prostitution, pandering or tax violation." *Id.* § 3-14-2.

If the clerk denies the application, the applicant then has twenty days to appeal the denial to the City Manager,[2]

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[1] In amending its ordinance in 2001, the City added more specific corporate disclosure requirements, but did not significantly alter the key provisions. Littleton, Colo., Ordinance 13 (2001).

[2] This is the time limit under the amended ordinance. Before the amendments, the ordinance gave the applicant only ten days to request

(Continued on following page)

who must hold a hearing within thirty days. *Id.* § 3-14-8. If that appeal is denied, the applicant may seek review in state court pursuant to Colorado Rule of Civil Procedure 106(a)(4). *Id.*

Licenses are issued for one-year terms and may be renewed only by filing a renewal application. *Id.* §§ 3-14-9, -10. Licenses may be suspended for one or more specified grounds. *Id.* § 3-14-11. Suspension or revocation may only occur after a hearing before the City Manager and may be appealed to state court. *Id.* Finally, under the amended ordinance, all adult businesses in Littleton that do not provide live entertainment are required to restrict entrance to individuals who are eighteen or older.[3] *Id.* § 3-14-16.

III

We initially determine whether there is an Article III case or controversy before us. *Essence, Inc. v. City of Fed. Heights,* 285 F.3d 1272, 1280 (10th Cir. 2002). Standing is an essential part of the case-or-controversy requirement of Article III. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). There are three elements to Article III standing: (1) injury-in-fact, (2) causation, and (3) redressability. *Essence,* 285 F.3d at 1280. An injury-in-fact is an "'invasion of a legally protected interest' that is (a) concrete and

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a hearing before the City Manager. Littleton, Colo., Ordinance 27 (1993).

[3] Under the original ordinance, admission to all adult businesses was limited to persons over twenty-one. Littleton, Colo., Ordinance 27 (1993).

particularized and (b) actual or imminent, i.e., not conjectural or hypothetical." *Id.* (quoting *Defenders of Wildlife,* 504 U.S. at 560). Causation requires a showing that the injury is "'fairly trace[able] to the challenged action of the defendant,' rather than some third party not before the court." *Id.* (quoting *Defenders of Wildlife,* 504 U.S. at 560). Redressability means that it is "likely that a favorable court decision will redress the injury of the plaintiff." *Id.* "The burden to establish standing rests on the party invoking federal jurisdiction." *Id.* When the case has been resolved in the district court on summary judgment grounds, "'a plaintiff must establish that there exists no genuine issue of material fact as to justiciability,' and 'mere allegations' of injury, causation, and redressability are insufficient." *Id.* (quoting *Dep't of Commerce v. United States House of Representatives,* 525 U.S. 316, 329 (1999)).

A

Standing usually requires that the plaintiff assert an injury to himself, rather than injuries to third parties not before the court. However, this rule is not strictly enforced in the context of facial challenges to laws as violative of the First Amendment, even though a facial challenge to the validity of a statute necessarily entails a challenge to the statute as applied to third parties besides the plaintiff:

> In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license.

Freedman v. Maryland, 380 U.S. 51, 56 (1965); *see also FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 223 (1990) (opinion of O'Connor, J.) ("Although facial challenges to legislation are generally disfavored, they have been permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad."). "A form of unbridled discretion is the failure to place brief, specific time limits on the decision-making process." *Nightclubs, Inc. v. City of Paducah,* 202 F.3d 884, 889 (6th Cir. 2000); *see also FW/PBS,* 493 U.S. at 223-24 (opinion of O'Connor, J.) (stating that unbridled discretion includes licensing schemes that create a "'risk of delay' such that 'every application of the statute creates an impermissible risk of suppression of ideas'" (quotations omitted)).

Littleton's ordinances include within their purview sexually explicit speech, and the City does not contest that this speech is protected by the First Amendment. ZJ's challenge to Littleton's licensing system is based both on a claim that the City vests too much discretion in licensing officials in granting or denying a license, and that the system creates a risk of delay in granting or denying a license. Thus, ZJ has standing to bring a facial challenge to the licensing system on these two grounds.

It is true that the overbreadth doctrine discussed above "does not eliminate the need for the plaintiff to demonstrate its own cognizable injury in fact." *Nat'l Council for Improved Health v. Shalala,* 122 F.3d 878, 883 (10th Cir. 1997). But this requirement is satisfied where the plaintiff is engaged "in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution."

Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 288 (1979). Such a plaintiff need not wait until an actual criminal prosecution has begun. *Id.*

ZJ's business depends in part on its ability to sell materials that are protected by the First Amendment. ZJ has alleged in its complaint that the City views it as an adult business that is in violation of the licensing requirements of the ordinance, and it has also presented a letter from the City denying ZJ's sales-tax license application because ZJ's business "may be categorized as an adult business." (3 Appellant's App. at 450.) ZJ has thus adequately shown that, at least from the City's perspective, its business is proscribed by the ordinance.

Finally, the City has proceeded with a civil complaint in state court against ZJ for violation of the ordinance based on ZJ's failure to apply for an adult-business license and ZJ's operation of an adult business without a license.[4] While ZJ's sales-tax license application was denied and a civil complaint was brought in state court only after ZJ's federal complaint was filed, these events nonetheless are evidence that when ZJ filed its lawsuit there was "a credible threat of prosecution" under Littleton's ordinance and that the threat of prosecution continues. *Babbitt,* 442 U.S. at 298; *see also id.* at 302 (indicating that standing exists "when fear of criminal prosecution under an allegedly

[4] In supplemental briefing the City explicitly waived the applicability of abstention under *Younger v. Harris,* 401 U.S. 37 (1971). A state may voluntarily submit to federal jurisdiction even though it might have had a tenable claim for abstention. *See Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.,* 477 U.S. 619, 626 (1986) (citing cases in which *Younger* abstention was waived).

unconstitutional statute is not imaginary or wholly speculative"). ZJ has satisfied the injury-in-fact requirement because the City has taken steps to enforce the ordinance against ZJ.[5]

B

ZJ also has standing to challenge the location requirements in Littleton's ordinance. Both parties agree that ZJ's business is located on a site in which adult businesses are not permitted under the ordinance. Based on the location of ZJ's business, the City has refused to grant ZJ a sales-tax license, and the City's complaint in state court is based in part on the location of ZJ's business. This is sufficient evidence for ZJ to meet the injury-in-fact requirement. By enacting and enforcing its ordinance, the City brought about ZJ's injury, and injunctive and declaratory relief, if granted by this court, would redress ZJ's injury.

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[5] While ZJ has never applied for an adult-business license, this is not a requirement for standing to mount a facial challenge against an ordinance. *See ACORN v. Municipality of Golden*, 744 F.2d 739, 744 (10th Cir. 1984) ("Applying for and being denied a license or an exemption is not a condition precedent to bringing a facial challenge to an unconstitutional law.").

ZJ, the City argues, has no standing to challenge the licensing requirements of the ordinance because – even if such a challenge were successful – ZJ would nonetheless be in violation of the location requirements of the ordinance. However, ZJ challenges both sets of requirements, and if both challenges are successful, then ZJ will obtain its desired relief. *See N. Ave. Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 443-44 (7th Cir. 1996). In addition, the parties' supplemental briefs reveal that the City is charging ZJ with separately violating both the licensing and location requirements. Thus, even if ZJ only succeeds in its challenge to the licensing provisions, it will nonetheless obtain some relief against prosecution by the City.

C

ZJ has challenged the provisions in Littleton's ordinance that require the City to reject adult-business license applications when the applicant has been convicted of specified past criminal acts. ZJ has never alleged that these restrictions would apply to any of the owners or operators of ZJ's business. ZJ therefore has not even argued that it might be affected by these provisions in Littleton's ordinance, and accordingly it does not have standing to challenge these provisions. *See FW/PBS*, 493 U.S. at 234 (stating that for a party to have standing to challenge a similar provision in a Dallas ordinance, "the individual must show both (1) a conviction of one or more of the enumerated crimes, and (2) that the conviction or release from confinement occurred recently enough to disable the applicant under the ordinance").

ZJ also attacks the ordinance's license revocation and suspension provisions. ZJ, however, has never obtained a license from the City, nor has it indicated that it plans to obtain a license. Instead, ZJ stated in its complaint that it "does not intend to operate an adult entertainment establishment in a B-2 zone." (1 Appellant's App. at 11.) ZJ has neither alleged nor provided any evidence that the licensing suspension or revocation proceedings will apply to it. As it is "pure conjecture," *Essence*, 285 F.3d at 1281, whether ZJ will be forced to comply with these provisions of the ordinance, ZJ likewise does not have standing to challenge these provisions. *Cf. id.* (holding that an adult business did not have standing to challenge a city's provisions for the granting of a license because the business already had a license and had not alleged any facts indicating that it would need to reapply for a license).

D

ZJ decries as overly vague the ordinance's definition of an "adult bookstore, adult novelty store, or adult video store" as a business that "devotes a significant or substantial portion" of its floor space, inventory, or advertising to adult materials, or that obtains "a significant or substantial portion" of its revenue from those materials. Littleton, Colo. City Code § 3-14-2.

In the First Amendment context, the Supreme Court has determined that a plaintiff *may* have standing to challenge a statute as overly vague with respect to third parties *even if* the suspect statute is "unquestionably applicable" to the plaintiff. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 59-60 (1976) ("On several occasions we have determined that a defendant whose own speech was unprotected had standing to challenge the constitutionality of a statute which purported to prohibit protected speech, or even speech arguably protected."). This "exception from traditional rules of standing" reflects the Supreme Court's judgment that "the very existence of some statutes may cause persons not before the Court to refrain from engaging in constitutionally protected speech or expression." *Id.* at 59-60.[6]

[6] Having reviewed the evidence provided by the parties in the present case, including the videotape of the interior of ZJ's business, we conclude that the ordinance is "unquestionably applicable" to ZJ – i.e., a "significant or substantial" portion of ZJ's stock-in-trade, interior floor space, or revenue is devoted to material that is "characterized by the depiction or description" of the defined "specified sexual activities" or "specified anatomical areas."

Nevertheless, as the Court in *Young* explained, "if the statute's deterrent effect on legitimate expression is not both 'real and substantial,' and if the statute is 'readily subject to a narrowing construction by the state courts,' the litigant is not permitted to assert the rights of third parties." *Id.* at 60 (citation omitted, quoting *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 216 (1975)).

In *Young,* the Court concluded that the ordinance in question did not have a "real and substantial" deterrent effect on legitimate expression because "there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance." *Id.* at 61. The same rationale applies equally to the present case. Adult businesses covered by Littleton's ordinance are, by definition, likely to carry materials that border on pornography. Stated simply, in light of *Young,* Littleton's ordinance does not have a "real and substantial" deterrent effect upon "legitimate expression."

As to the second issue raised by *Young* – whether the ordinance is readily subject to a narrowing construction – we note that language similar to the "significant or substantial" language used in this ordinance has been interpreted previously by state courts in a sufficiently narrow manner to avoid constitutional problems. A common method of narrowing construction has been to develop a percentage that will act as a guide as to what constitutes "significant or substantial." *See, e.g., Dandy Co. v. Civil City of South Bend,* 401 N.E.2d 1380, 1385-86 (Ind. Ct. App. 1980) (holding that a conviction under a similar ordinance was sustainable where there was evidence that "50 to 80% of the inventory was adult in nature"); *St.*

Louis County v. B.A.P., Inc., 25 S.W.3d 629, 630-31 (Mo. Ct. App. 2000) (noting that a local adult-business ordinance established a rebuttable presumption that a business carries "a substantial portion" of adult-oriented items where more than twenty-five percent of the retail value of the inventory consists of such items); *City of New York v. Les Hommes*, 724 N.E.2d 368, 370 (N.Y. 1999) (noting that the City of New York had clarified that a "substantial portion" for purposes of its adult-business ordinance meant at least forty percent). We conclude that "the limited amount of uncertainty in the ordinance[ ] is easily susceptible of a narrowing construction." *Young*, 427 U.S. at 61.

In short, we agree with the district court that ZJ "does not have standing to challenge the constitutionality of [Littleton's ordinance] under the void for vagueness doctrine." (3 Appellant's App. at 561.)

E

Finally, Littleton's ordinance as originally enacted prohibited individuals under twenty-one years of age from being licensees, owners, managers, employees, or customers of an adult business. ZJ argues that it is unconstitutional to restrict individuals between the ages of eighteen and twenty-one from entering or working in its business. We need not address ZJ's challenge to the age restrictions, however, because the City has amended its ordinance to provide that anyone over eighteen years of age may enter

an adult business that does not offer live entertainment.[7] Thus, ZJ's challenge to the age restrictions on customers and employees of its business is now moot, and we will not address it.

IV

We now address ZJ's claims that Littleton's licensing scheme grants excessive discretion to licensing officials.

Because this case was decided on summary judgment, we review the district court's decision de novo, applying the same legal standard as the district court. *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) para. 4. "When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the non-moving party." *Simms*, 165 F.3d at 1326. "If there is no genuine issue of material fact in dispute, we determine whether the district court correctly applied the substantive law." *Id.* In the First Amendment context, "[o]ur review of the record is more rigorous," and we are "obligated to make an independent

[7] To the extent that other provisions of Littleton's ordinance conflict with this amendment, they have been repealed. Littleton, Colo., Ordinance 13, § 9 (2001).

examination of the record in its entirety." *Essence,* 285 F.3d at 1283 (quotation omitted).

Littleton's ordinance requires all adult businesses to obtain a license prior to opening for business. "Adult businesses," as defined by the ordinance, include adult bookstores and adult video stores, *see* Littleton, Colo., City Code § 3-14-2, that sell materials presumptively protected by the First Amendment.[8] A very similar licensing scheme was analyzed as a "prior restraint" on speech by six of the Justices of the Supreme Court in *FW/PBS,* 493 U.S. at 225-30 (opinion of O'Connor, J.); *id.* at 238 (Brennan, J., concurring). Following *FW/PBS,* we have concluded that "licensing of adult entertainment establishments" must be analyzed as a prior restraint. *Essence,* 285 F.3d at 1289-90.

Ordinarily, a duly enacted law is presumed to be constitutional. When a law infringes on First Amendment rights, however, the proponent of the law bears the burden of establishing its constitutionality. *Wilson v. Stocker,* 819 F.2d 943, 949 (10th Cir. 1987). Whether or not Littleton's ordinance is content-neutral is not relevant to the burden of proof, because any "system of prior restraint" comes to this court "bearing a heavy presumption against its constitutional validity." *FW/PBS,* 493 U.S. at 225 (quotation

[8] In the instant case, the City does not argue that the materials sold by "adult businesses" are obscene and therefore unprotected by the First Amendment. The City has therefore effectively made the same concession that the City of Dallas made in *FW/PBS*: i.e., that the ordinance applies to businesses that purvey speech protected by the First Amendment. *See FW/PBS,* 493 U.S. at 224 (noting that the Dallas ordinance largely targeted businesses that purvey sexually explicit speech and no claim was made that such materials were unprotected by the First Amendment).

omitted). In the present case, therefore, the City bears the burden of establishing that Littleton's ordinance is constitutional.

A

Standards for analysis of a prior restraint of speech were initially developed in the context of censorship schemes in *Freedman,* where the Supreme Court held that (1) a censorship scheme must assure the exhibitor, "by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film"; (2) the censorship scheme must "assure a prompt final judicial decision" following a refusal to license; and (3) "the burden of proving that the film is unprotected expression must rest on the censor." 380 U.S. at 58-59.

In *FW/PBS,* a divided Supreme Court considered whether *Freedman's* procedural requirements applied to adult-business licensing schemes as well. Two Justices joined Justice O'Connor in announcing the judgment of the Court that the Dallas licensing scheme at issue was unconstitutional. *FW/PBS,* 493 U.S. at 229. Three other Justices concurred but would have gone further in applying the *Freedman* requirements. *Id.* at 238-39 (Brennan, J., concurring). Justice O'Connor's opinion characterizes *Freedman* as mandating that any prior restraint "that fails to place limits on the time within which the decisionmaker must issue the license is impermissible," *FW/PBS,* 493 U.S. at 226, because a "scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech," *FW/PBS,* 493 U.S. at 227. The Court in *FW/PBS* determined that the

Dallas ordinance failed to meet this general requirement because a license could not be approved without inspection and approval by the fire department, the health department, and the building official as being in compliance with relevant laws and ordinances. *Id.* Even though a completed license application had to be approved or disapproved within thirty days after submission, there was nonetheless a risk that the city could endlessly delay those inspections and approvals in order to postpone consideration of a license application because there was no time limit for the inspections and approvals. *Id.* Concluded the Court: "Thus, the city's regulatory scheme allows indefinite postponement of the issuance of a license." *Id.*

Justice O'Connor then reiterated the *Freedman* procedural requirements:

> [T]he following three procedural safeguards were necessary to ensure expeditious decisionmaking by the motion picture censorship board: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

Id. at 227. Concluding that the "first two safeguards are essential" to preventing undue delay in the licensing process, *id.* at 228, and that the Dallas licensing scheme "fails to provide an avenue for prompt judicial review" of a license denial, *id.* at 229, Justice O'Connor's opinion held that *Freedman*'s third requirement – that the censor bear the burden of obtaining judicial action and of proof – need

not be applied in the context of adult-business licensing schemes. *Id.* at 230.

The remainder of the Court was sharply divided. Justice Brennan, joined by two other Justices, agreed that the Dallas ordinance was an unconstitutional prior restraint, but would have applied all three of the *Freedman* procedural requirements. *Id.* at 238-39 (Brennan, J., concurring). Justice White, joined by the Chief Justice, concluded that the Dallas ordinance was constitutional and that none of the *Freedman* procedural requirements applied because the ordinance was not a prior restraint. *Id.* at 245 (White, J., concurring and dissenting). Justice Scalia concurred in part and dissented in part on other grounds. *Id.* at 250 (Scalia, J., concurring and dissenting).

Faced with the fractured decision in *FW/PBS*, our sibling courts of appeals have struggled to determine which of *Freedman*'s requirements apply to licensing schemes. Joined by several other circuits, we have concluded that the first two *Freedman* requirements – maintenance of the status quo and expeditious judicial review – are applicable to the licensing context. *See Essence*, 285 F.3d at 1290; *see also, e.g., Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1100-01 (9th Cir. 1998); *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988, 996 & n.12 (4th Cir. 1995); *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 707-08 (5th Cir. 1994). With respect to *Freedman*'s third requirement – that the censor must bear the burden of going to court and of proof – our circuit has not yet decided whether it is applicable to adult-business licensing schemes. *See Essence*, 285 F.3d at 1290 n.17. Other circuits, however, have held that the third requirement of *Freedman* does not apply to licensing

schemes that do not directly regulate content. *See MacDonald v. City of Chicago,* 243 F.3d 1021, 1035-36 (7th Cir. 2001); *Ward v. County of Orange,* 217 F.3d 1350, 1355 (11th Cir. 2000); *Steakhouse, Inc. v. City of Raleigh,* 166 F.3d 634, 640-41 (4th Cir. 1999). Because ZJ does not argue that the Littleton ordinance fails to satisfy the third *Freedman* requirement, we limit our analysis here to the two procedural safeguards clearly adopted in *FW/PBS.*

B

Our first inquiry is whether Littleton's ordinance satisfies the requirement that "any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained." *FW/PBS,* 493 U.S. at 227. Although the ordinance specifies that a license application must be approved within thirty days, Littleton, Colo., City Code § 3-14-8, ZJ stresses that, before an application is accepted, (1) applicants are required to obtain a written statement from the City's Zoning Official stating that the proposed location is in compliance with the location requirements of the ordinance, (2) specified persons named on the application must be fingerprinted and photographed by the Police Department,[9] and (3) the applicant must obtain a sales-tax

[9] Littleton's original ordinance required all principal owners, managers and employees to be photographed and fingerprinted. Littleton, Colo., Ordinance 27 (1993). In 2001, the City eliminated the requirement with respect to employees, but specified that managers, general partners and (in the case of a corporation) the president of the corporation must be photographed and fingerprinted. Littleton, Colo., Ordinance 13 (2001). No time limit for the fingerprinting and photography

(Continued on following page)

license. ZJ argues that these provisions present the possibility of indefinite postponement of a license. *Id.*

Justice O'Connor's opinion in *FW/PBS,* which announced the judgment of the Court, held that the Dallas ordinance in question allowed for indefinite postponement of a license because the premises had to be approved in advance by "the health department, fire department and the building official." 493 U.S. at 227. Although the prerequisites required by Littleton's ordinance are arguably less onerous than those in *FW/PBS,* Littleton's ordinance similarly does not specify a time limit within which the City must complete them. We therefore consider whether they render Littleton's ordinance unconstitutional for failure to satisfy the first requirement of *Freedman* and *FW/PBS.*

Every retail business in Colorado must obtain a sales-tax license. Colo. Rev. Stat. § 39-26-103. Because this requirement is not specific to adult businesses, it is irrelevant to the constitutionality of the licensing ordinance at issue in the present case. The City does not argue, however, that the other two requirements are similarly applicable to all businesses, and we therefore presume that they are specific to adult businesses. Littleton's ordinance provides no assurance that the City will promptly act on a pre-application request for a certification of zoning compliance or for fingerprinting or photography.

During oral argument of the present case, counsel for the City offered to make a "judicial admission" on behalf of

was specified either in the original ordinance or in the amended ordinance.

the City that "if the Zoning Official doesn't act, the application can be complete without his statement." Littleton's ordinance, however, explicitly states that the "City Clerk shall not accept any application that is not complete in every detail." Littleton, Colo., City Code § 3-14-5. Such details presumably include the provision of the Zoning Official's letter as well as the requirements of photography and fingerprinting by the Police Department. By interpreting the ordinance as allowing for the submission of an incomplete application in the event of delay by the Zoning Official, appellee's counsel is stating a legal conclusion, and courts are reluctant to treat opinions and legal conclusions as judicial admissions. *See MacDonald v. General Motors Corp.,* 110 F.3d 337, 341 (6th Cir. 1997); *Glick v. White Motor Co.,* 458 F.2d 1287, 1291 (3d Cir. 1972); *New Amsterdam Cas. Co. v. Waller,* 323 F.2d 20, 24 (4th Cir. 1963). "A matter as important as the constitutionality of a state statute should not be decided on the basis of an advocate's concession during oral argument." *Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 398 (1988) (Stevens, J., concurring in part and dissenting in part).

Moreover, *Freedman* requires that either a "statute or authoritative judicial construction" must specify the time limit within which the license must be issued or denied, 80 U.S. at 58-59, and there is nothing in Justice O'Connor's opinion suggesting that this requirement was changed in *FW/PBS.* Federal courts "lack jurisdiction authoritatively to construe state legislation." *United States v. Thirty-Seven (37) Photographs,* 402 U.S. 363, 369 (1971). Only if a state law is "readily susceptible" of an interpretation may the federal courts subject it to a narrowing construction, and "we will not rewrite a state law to conform it to constitutional requirements." *Am. Booksellers Ass'n,* 484

U.S. at 397 (majority opinion). Because Littleton's ordinance is not "readily susceptible" to the interpretation offered by the City – to the contrary, it is readily susceptible to the opposite interpretation – much as we are tempted, we cannot decide this case on the basis of Littleton counsel's oral argument offer.

Although the Colorado Supreme Court upheld a similar requirement that a zoning permit must accompany the application for a sexually-oriented-business license in *City of Colo. Springs v. 2354, Inc.,* 896 P.2d 272, 281-82 (Colo. 1995), a separate Zoning Ordinance in that case required that a zoning administrator "approve or deny a zoning permit application within ten working days of the submittal." *Id.* at 282. Counsel for the City implicitly conceded at oral argument that no such time limit is present in this case. Because no time limit is specified in the ordinance or by authoritative judicial construction, we hold that the subject ordinance's requirement that a letter from the Zoning Official accompany the application, along with the fingerprinting and photography requirements, are unconstitutional for failure to specify a time limit within which the City must act.[10] *See FW/PBS,* 493 U.S. at 227. To the extent that the City's motion for summary

[10] As noted above, this defect in Littleton's ordinance cannot be cured by "judicial admission," as the City's counsel suggests. Appropriate procedures under Colorado law for the amendment of a city ordinance must be followed. It is not our role to sit as a party to negotiations concerning the implementation of the City's code. Littleton's ordinance can easily be amended to state that an application may be submitted without zoning approval, fingerprinting, or photography if a good faith request is not acted on by the Zoning Official or the Police Department within a specified brief time period.

judgment on this point was granted and ZJ's motion for partial summary judgment was denied, the order of the district court is reversed.

C

Having held that Littleton's ordinance fails to meet the first test of *FW/PBS,* we must decide whether the unconstitutional provisions are severable. Under Colorado law, a section of a legislative enactment is severable if the remaining portion of the statute is autonomous and the legislature's will in passing the entire statute is not thwarted by the excision. *City of Lakewood v. Colfax Unlimited Ass'n,* 634 P.2d 52, 70 (Colo. 1981) (en banc). Utilization of a severability clause creates a presumption that the legislature would have been satisfied with the remaining portions of the enactment. *Id.* A provision will not be held severable, however, if the remaining enactment is "so incomplete or riddled with omissions" that it lacks coherence. *Id.*

At issue in the present case is an ordinance that contains a severability clause, both in its original version and in the amended version. Littleton, Colo., Ordinance 13, § 8 (2001); Littleton, Colo., Ordinance 27, § 8 (1993). More importantly, other requirements of the ordinance do not depend upon the constitutionally suspect pre-application requirements for coherence or consistency, and the purpose of the ordinance is not thwarted by their excision. As a result, we conclude that the pre-application licensing provisions of the ordinance are severable.

D

Because other provisions of Littleton's ordinance, if constitutional, may be enforced without the pre-application requirements, we must decide whether the remainder of the ordinance is constitutional. Thus we consider the "prompt judicial review" requirement adopted by the Supreme Court in *FW/PBS,* 493 U.S. at 228. ZJ argues that "prompt judicial review" requires the City to provide a "prompt decision" from the courts as to whether a license should have been granted or denied. (Appellant's Br. at 23.) According to the City, however, "prompt judicial review" means only that there must be " 'the possibility' or 'an avenue' for prompt judicial review," and there need not be a "judicial determination" within a short period of time. (Appellee's Am. Resp. Br. at 47.)

The circuits are divided over this question. Some have held that "prompt judicial review," at least with regard to licensing decisions, requires only that the government provide prompt *access* to the courts. *See, e.g., Boss Capital, Inc. v. City of Casselberry,* 187 F.3d 1251, 1256-57 (11th Cir. 1999) (concluding that "access to prompt judicial review is sufficient for *licensing* decisions"); *TK's Video v. Denton County,* 24 F.3d 705, 709 (5th Cir. 1994) (same); *see also Graff v. City of Chicago,* 9 F.3d 1309, 1324-25 (7th Cir. 1993) (en banc) (opinion of Manion, J.) (noting the availability of the common-law writ of certiorari and finding this procedure sufficient under *FW/PBS*); *Jews for Jesus v. Mass. Bay Trans. Auth.,* 984 F.2d 1319, 1327 (1st. Cir. 1993) (implying that access is sufficient). Others have concluded that "prompt judicial review" requires a prompt judicial *resolution* of license denials. *See Nightclubs, Inc. v. City of Paducah,* 202 F.3d 884, 892-93 (6th Cir. 2000); *Baby Tam & Co. v. City of Las Vegas,* 154 F.3d 1097, 1101-02 (9th

Cir. 1998); *11126 Baltimore Boulevard, Inc. v. Prince George's County,* 58 F.3d 988, 1000-01 (4th Cir. 1995).

Access to prompt judicial review was selected as the appropriate standard by the Eleventh Circuit in *Boss Capital,* 187 F.3d at 1255-57. That case enunciates two principal bases in support of its holding that mere access is sufficient in adult-business licensing cases. First, *Boss Capital* holds that Justice O'Connor modified the second *Freedman* requirement relating to judicial review in the adult-business licensing context. *Id.* at 1255-56. Second, *Boss Capital* reasons that this interpretation of *FW/PBS* is appropriate given the difference between censorship cases and licensing cases. *Id.* at 1256-57.

Focusing on Justice O'Connor's language, the Eleventh Circuit points out that Justice O'Connor uses different terminology than Justice Brennan in describing *Freedman*'s second requirement. *Id.* at 1255 (citing *FW/PBS,* 493 U.S. at 228-29). Justice O'Connor's opinion holds that there must be "the *possibility* of prompt judicial review" in the event a license is denied, *FW/PBS,* 493 U.S. at 228 (opinion of O'Connor, J.) (emphasis added), and states that the Dallas ordinance failed to provide an "*avenue* for prompt judicial review," *id.* at 229 (emphasis added). Later, the requirement is characterized by Justice O'Connor as "the *availability* of prompt judicial review." *Id.* at 230 (emphasis added). In contrast, Justice Brennan's concurrence states that a "prompt judicial *determination* must be available." *Id.* at 239 (Brennan, J., concurring) (emphasis added).

Justice O'Connor's language could arguably mean that the *FW/PBS* Court modified the second *Freedman* requirement in the context of licensing cases. *See Boss*

Capital, 187 F.3d at 1255-56 (relying partially on the difference of language to distinguish *Freedman* from *FW/PBS*).[11] It is by no means clear, however, that Justice O'Connor intended to change the meaning of the "prompt judicial review" requirement. First, when Justice O'Connor refers to "prompt judicial review," she cites to *Freedman,* which unequivocally stated that the procedure must "assure a prompt final judicial determination." 380 U.S. at 59; *see also 11126 Baltimore Boulevard,* 58 F.3d at 999 (discussing this point). Other decisions following *Freedman* have used the phrase "prompt judicial review" to indicate a prompt judicial *determination,* albeit in a censorship context. *See 11126 Baltimore Boulevard,* 58 F.3d at 1000 (listing several Supreme Court cases). Moreover, elsewhere in her opinion in *FW/PBS,* Justice O'Connor states that the "first two safeguards" provided

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[11] If the O'Connor opinion did modify *Freedman*'s "prompt judicial review" requirement for the licensing context, then it arguably struck down the ordinance at issue in *FW/PBS* on a narrower ground (failure to provide prompt *access* to judicial review) than the Brennan concurrence would have (failure to provide the prompt judicial *determination* required by *Freedman*). If that is the case, then the O'Connor restatement of the "prompt judicial review" requirement might well state the law, at least in the context of adult business licensing. *See Marks v. United States,* 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (quotation omitted)). Whether this would constitute the narrowest ground for decision is debatable, however. *See 11126 Baltimore Boulevard,* 58 F.3d at 999 & n.15 (arguing that, if Justice O'Connor modified the *Freedman* requirement, this was not the narrowest ground for decision). Because we conclude that Justice O'Connor did not modify the second *Freedman* requirement in the licensing context, we need not decide which ground for decision in *FW/PBS* was the narrowest.

for by *Freedman* are "essential." *FW/PBS,* 493 U.S. at 228. Although Justice O'Connor inevitably qualifies the prompt judicial review requirement by referring to the "possibility," "availability," or "avenue" of such review, such qualification most likely amounts to an acknowledgment that it is up to the plaintiff to decide whether or not to seek judicial review. This language does not necessarily indicate any intent to weaken the second *Freedman* requirement.

Parties always have *access* to the courts. *See FW/PBS,* 493 U.S. at 248 (White, J., dissenting) ("[N]o one suggests that licensing decisions are not subject to immediate appeal to the courts."); *Baby Tam,* 154 F.3d at 1101 ("[A] person always has a judicial forum when his speech is allegedly infringed." (quoting *Graff,* 9 F.3d at 1324)). Judicial review is available regardless of whether an applicable state court procedure is expressly mentioned in the ordinance. In order to have "prompt judicial review," however, a party necessarily must be able to obtain a *decision,* for "without a decision, the most exhaustive review is worthless."[12] *Baby Tam,* 154 F.3d at 1101-02. Thus, Justice O'Connor's "avenue for prompt judicial review" requirement in a First Amendment context makes far more sense if it is understood to mean a prompt final judicial determination.

[12] *Baby Tam* draws an analogy to baseball. Judicial review without a decision "would be like throwing a pitch and not getting a call. As legendary major league umpire Bill Klem once said to an inquisitive catcher: 'It ain't nothin' till I call it.' This is also true of judicial review. Until the judicial officer makes the call, it ain't nothin'." 154 F.3d at 1102.

The Eleventh Circuit further points out in *Boss Capital* that *Freedman* and the line of cases following it can be distinguished from adult-business licensing cases on the grounds that they involved censorship rather than licensing. Justice O'Connor held in *FW/PBS* that licensing schemes do not involve "the grave 'dangers of a censorship system,'" and therefore "the full procedural protections set forth in *Freedman* are not required." 493 U.S. at 228 (citation omitted). As the Eleventh Circuit notes, adult-business licensing schemes primarily involve "mundane and ministerial factors," such as the general qualifications of each applicant.[13] *Boss Capital,* 187 F.3d at 1256. In contrast, censorship cases involve a highly subjective judgment about the nature of the suspect material.

In addition, the Eleventh Circuit notes, "unlike movie distributors who might show a given film in hundreds of theaters around the country," applicants for adult-business licenses arguably have a greater incentive "to stick it out and see litigation through to its end." *Id.* at 1256. *Freedman*'s rationale therefore arguably makes less sense in the licensing context, and *Boss Capital* concludes that the need for a prompt judicial decision is therefore "less compelling."[14] *See Boss Capital,* 187 F.3d at 1256-57 (arguing that

[13] Littleton's ordinance, for example, lists eight specific reasons to deny a license – although the ordinance does not explicitly state that this list is exclusive – and these reasons do not involve discretion on the part of the licensing official. Littleton, Colo., City Code § 3-14-8.

[14] Analyzing the constitutionality of a permit requirement for a public forum, the Supreme Court has recently held that an ordinance that gives no discretion to the licensing official does not threaten to stifle free expression. *See Thomas v. Chi. Park Dist.,* 122 S. Ct. 775, 780-81 (2002). However, *Thomas* distinguishes *FW/PBS* on the grounds that "it involved a licensing scheme that target[ed] businesses purveying

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access to prompt judicial review is sufficient for licensing cases). Because the ordinance in dispute contained an explicit judicial review provision, the Eleventh Circuit held it constitutional. *Id.* at 1255, 1257.

Boss Capital draws a rational distinction between licensing cases and censorship cases. The purpose of Justice O'Connor's language distinguishing between these two categories, however, is most logically understood as an attempt at explaining why *Freedman*'s third safeguard – that the burden of going to court and the burden of proof must be on the censor – is not appropriate to the licensing context. *See FW/PBS,* 493 U.S. at 229-30 (concluding that the third *Freedman* requirement does not apply to licensing cases). If Justice O'Connor had intended to adopt a different judicial review requirement for licensing cases, she could have done so explicitly, just as she explicitly rejected the burden-shifting requirement.

Other circuits have held that the judicial review requirement of *Freedman* was not altered by *FW/PBS*. As the Sixth Circuit notes, Justice O'Connor "gave no indication that she was modifying the second requirement of prompt judicial review" in the licensing context. *Nightclubs,* 202 F.3d at 893. According to the Ninth Circuit, the *FW/PBS* plurality "took issue only with *Freedman*'s requirement that the censor bear the cost of going to court to obtain judicial review; otherwise, *FW/PBS* offered nothing different from *Freedman*'s concept of what 'judicial

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sexually explicit speech," *id.* at 780 n.2 (quotation omitted), and the Court did not overrule its earlier decision that the first two *Freedman* requirements must be applied in adult-business licensing cases.

review' meant." *Baby Tam,* 154 F.3d at 1102; *see also 11126 Baltimore Boulevard,* 58 F.3d at 999 (reaching the same conclusion). If the Court adopted the *Freedman* requirement without modification in *FW/PBS,* then the distinction between licensing and censorship is not relevant here.

Even if the rationale behind *Freedman* is specific to censorship cases, there is an equally valid rationale for requiring prompt judicial review in adult-business licensing cases. Although adult-business licensing ordinances are technically considered "content-neutral," *ZJ Gifts D-2, L.L.C. v. City of Aurora,* 136 F.3d 683, 686-88 (10th Cir. 1998), they are distinguishable from other content-neutral time, place, and manner restrictions insofar as they target "businesses purveying sexually explicit speech." *Thomas v. Chi. Park Dist.,* 122 S. Ct. at 780 n.2 (2002) (quoting *FW/PBS,* 493 U.S. at 224). A licensing official may have little or no discretion in reviewing an application, but he or she may be tempted nonetheless to overstep the bounds of the ordinance.

Adult businesses are controversial, and the possibility exists that licensing officials might allow their personal views on the morality of sexually explicit entertainment to sway a decision on an application. Given the strong feelings that adult businesses can engender, there must be a prompt judicial determination to ensure that licensing officials do not exceed their authority under the ordinance in their zeal to protect the local community. ZJ sells sexually explicit magazines and videocassette tapes, which are presumptively protected by the First Amendment, *see FW/PBS,* 493 U.S. at 224, and the danger that an ordinance like Littleton's may be improperly used as a subterfuge for censorship is too great to overlook the necessity for a prompt judicial determination.

In short, we are not persuaded by those circuits that have concluded that mere "access" to judicial review is sufficient in licensing cases. Following the Fourth, Sixth and Ninth Circuits, we hold that, in the event that an adult-business license is denied, *FW/PBS* requires a prompt final judicial *decision* regarding the validity of the denial. "[A] theoretical possibility of expeditious judicial review is not constitutionally sufficient." *Nightclubs,* 202 F.3d at 892. "While we trust state courts to exercise due diligence, we cannot be sure that a state judge . . . toiling under a busy docket, will conduct a hearing and render a decision in a prompt manner." *Id.* Prompt judicial review, including a prompt final decision, must be assured in all First Amendment licensing cases in order for the second requirement of *Freedman* and *FW/PBS* to be satisfied. What constitutes a prompt judicial determination in the adult-business licensing context is to be determined by reference to the Supreme Court's jurisprudence following *Freedman. See, e.g., Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 561-62 (1975) (holding that a judicial review process lasting more than five months was not prompt).

Littleton's ordinance allows a party whose license has been denied to appeal to the Colorado district court under Colorado Rule of Civil Procedure 106(a)(4). This Rule allows an adverse decision regarding the license to be given expedited review in the trial court's discretion. *2354 Inc.,* 896 P.2d at 284 (citing Colo. R. Civ. P. 106(a)(4)(VIII)). Because this Rule does not assure that license decisions will be given expedited review, however, it does not save Littleton's ordinance. Accordingly, the order of the district court granting summary judgment for the City is reversed

to the extent that it held the judicial review procedure to be constitutionally sufficient.

V

Finally, ZJ attacks the location restrictions in Littleton's ordinance as unconstitutional because they do not provide reasonable alternatives of communication, as required by *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986).[15] It is the City's burden to demonstrate that its ordinance meets this requirement. *See ZJ Gifts,* 136 F.3d at 688.

Renton considered a local ordinance that restricted the location of adult businesses. 475 U.S. at 44. Content-neutral zoning ordinances, the Court held, are permissible so long as "reasonable alternative avenues of communication" are left open, *id.* at 53, a question that is answered through an analysis of how much land is available in which adult businesses may be located under the zoning system, *id.* at 53-54. In undertaking that analysis, the courts must examine what land is actually available, but

[15] In its reply and supplemental briefing, ZJ argued that the location restrictions in Littleton's ordinance should be viewed as "content-based" restrictions on speech subject to strict scrutiny. In particular, ZJ argues that the recent Supreme Court decision in *Thomas,* 122 S. Ct. 775 (2002), and Justice Kennedy's opinion in *City of Los Angeles v. Alameda Books, Inc.,* 122 S. Ct. 1728, 1739 (2002) (Kennedy, J., concurring in the judgment), support this claim. This court, however, has previously held that a nearly identical ordinance should be reviewed as a "content-neutral" regulation subject to intermediate scrutiny. *See ZJ Gifts,* 136 F.3d at 686-88. We see nothing in either *Thomas* or *Alameda Books* that requires reconsideration of our conclusion as to the applicable standard of review.

also must keep in mind that adult businesses must "fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees." *Id.* at 54.

How much land is sufficient to constitute "reasonable alternative avenues of communication" is a question that the *Renton* Court left open. In *Renton,* the ordinance left "520 acres, or more than five percent of the entire land area of" the city, open for adult businesses, with the land "in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads." *Id.* at 53 (quotation omitted). The *Renton* Court determined that the ordinance "easily meets" the requirement of providing a "reasonable opportunity to open and operate an adult theater within the city." *Id.* at 54.

Under Littleton's ordinance, there are approximately one-hundred acres of land that are within industrial zones and outside the minimum distance from nearby schools, day care centers, and correctional facilities.[16] This land constitutes between 1.2 and 1.3% of the total acreage of the City of Littleton. At least one other court of appeals has found this proportion of land to be sufficient under

[16] ZJ argues that some of these parcels are unavailable because portions of the parcels are within five-hundred feet of schools, day care centers, and correctional facilities. However, as the record shows, the majority of these parcels are outside the distance limits. Under Littleton's ordinance, the distance limits are only violated if the exterior wall of the structure in which the adult business is located is within the minimum distance from the neighboring use. Thus, these parcels are available for use by an adult business as long as the business locates in the portions of the parcels where such uses are permitted.

Renton. See Lakeland Lounge of Jackson, Inc. v. City of Jackson, 973 F.2d 1255, 1260 (5th Cir. 1992).

ZJ argues that portions of this land are unavailable because specific parcels are (1) currently occupied by large-scale manufacturing uses, *see Topanga Press, Inc. v. City of Los Angeles,* 989 F.2d 1524, 1531-32 (9th Cir. 1993), or (2) currently owned by governmental entities, *see Centerfold Club, Inc. v. City of St. Petersburg,* 969 F.Supp. 1288, 1305 (M.D. Fla. 1997).

First, we disagree with the notion that warehouses and other large-scale manufacturing uses must be excluded per se from any calculation of whether there is sufficient land for adult business uses. In *Renton* itself the Supreme Court noted the diversity of property that was available for adult business use under the ordinance – "industrial, *warehouse,* office, and shopping space," *Renton,* 475 U.S. at 53 (emphasis added) – in concluding that there was sufficient land available. Similarly, Littleton's ordinance leaves a diversity of different types of properties available for use by an adult business, including large-scale manufacturing and warehouse uses. Under *Renton,* there is no need to exclude those uses from our analysis.[17] While it may indeed be more difficult and more expensive for an adult-business owner to acquire and convert these types of properties, there is no requirement that those

[17] We add that we do not address a situation where all or nearly all properties consist of large-scale manufacturing and warehouse uses, such that the diversity of land uses described in *Renton* does not exist. In such a situation, the municipality may be "effectively denying" adult businesses "a reasonable opportunity to open and operate." *Renton,* 475 U.S. at 54.

businessmen must "be able to obtain sites at bargain prices." *Id.* at 54.

As for inclusion of the government-owned properties, we need not decide whether that is permissible under the *Renton* analysis. Even excluding those parcels that are government-owned according to evidence introduced by ZJ, there is sufficient property zoned for adult business uses to meet the requirements of *Renton*. ZJ submitted evidence identifying only one specific property – the Littleton City Shops between Belleview Avenue and Prentice Avenue, constituting twelve acres – as being owned by the government. Other properties mentioned by ZJ in its brief – a fire training center, a nature area, and the Arapahoe County Government Center – are not identified by parcel, nor does ZJ provide any information as to their total acreage. However, even giving ZJ the benefit of the doubt as to these additional properties, based on the information we can glean from the record, removing these properties would only reduce the total available area by approximately ten acres.[18] Thus, the total area available

[18] In reaching this conclusion, we draw the following inferences in ZJ's favor: Littleton's fire protection center and the abandoned city property are located in an industrial zone that comprises approximately eight acres near the intersection of Chenango and Vallejo Streets. We assume that all of those properties were used by both the fire protection center and the abandoned city property, and we remove them from our analysis. As for the Arapahoe Government Center, ZJ relies on the City's maps in the record as evidence regarding its location on "South Crestline Avenue." We can find only an ambiguous reference for a parcel south of West Crestline Avenue, which appears to occupy about two acres of the industrial zones. ZJ has provided us with absolutely no information from which an inference can be drawn regarding the specific location or acreage of Littleton's nature area.

excluding government properties would be about seventy-eight acres, or just under one percent of the total area of the City.

Moreover, excluding both the government properties to which ZJ objects as well as those properties that are implicated by the minimum distance requirements of the ordinance, the City has listed over twenty sites within the industrial districts that its real estate expert stated would be available for adult businesses. Given the small population of Littleton (forty-thousand people), and the fact that ZJ is the only adult business that is currently located in Littleton, this is a sufficient number of available sites. *See Diamond v. City of Taft*, 215 F.3d 1052, 1058 (9th Cir. 2000) (holding seven available sites sufficient where only one business sought to locate within the municipality), *cert. denied*, 531 U.S. 1072 (2001);[19] *see also Boss Capital*, 187 F.3d at 1254 (listing factors to be considered in analyzing whether there are sufficient sites for adult businesses, including geographical size of the locality, location of sites, number of adult businesses currently operating or seeking permission to operate, and population). We conclude that

[19] Where an adult-business zoning regulation prohibits the location of one adult business within a minimum distance of another one – as Littleton's ordinance does – some courts have required the analysis of the minimum number of sites to take into account those spacing requirements, dramatically reducing the potential number of sites. *See, e.g., Young v. City of Simi Valley*, 216 F.3d 807, 821 n.13 (9th Cir. 2000). ZJ has never argued that we should incorporate the spacing requirements into our analysis, and given that ZJ is the only adult business currently operating or seeking to operate in Littleton, such an adjustment would be inappropriate in the first place. *See Diamond*, 215 F.3d at 1057-58.

the ordinance meets the requirements of *Renton*,[20] and the section of the district court order dealing with the location requirements of Littleton's ordinance is affirmed.

VI

In sum, we conclude that ZJ has standing to challenge the pre-application and location requirements of the ordinance and the judicial review procedure. ZJ lacks standing, however, to challenge the ordinance as vague, attack the ordinance's license revocation and suspension provisions, or challenge the age and criminal history restrictions in the ordinance. As to the merits of ZJ's challenge, we hold that the judicial review procedure and pre-application requirements of Littleton's ordinance are unconstitutional, but that the location requirements of the ordinance are constitutional.

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[20] ZJ urges us to hold that the Colorado Constitution provides broader protections than the United States Constitution in this context. None of the cases cited by ZJ in support of this proposition, however, involves a challenge to adult-business licensing ordinances. *See Bock v. Westminster Mall Co.*, 819 P.2d 55, 56 (Colo. 1991) (discussing plaintiffs' right to distribute political leaflets in a shopping mall); *People v. Ford*, 773 P.2d 1059, 1061 (Colo. 1989) (addressing the constitutionality of the Colorado obscenity statute); *People v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 353 (Colo. 1985) (same). In analyzing a local ordinance regulating nude dancing, the Colorado Supreme Court relied almost exclusively on federal cases in determining that the ordinance did not violate the free speech protections of either the federal or state constitutions. *See 7250 Corp. v. Bd. of County Comm'rs*, 799 P.2d 917, 924-28 (Colo. 1990) (en banc). We have found no evidence that in this particular field of free speech jurisprudence the Colorado courts have interpreted the state constitution to provide greater protection than the federal Constitution.

The judgment of the district court is **AFFIRMED** in part and **REVERSED** in part.[21]

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[21] We grant the City's motions to file additional supplemental appendices.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham

Civil Action No. 99-N-1696

Z.J. GIFTS D-4, L.L.C., a Colorado Limited Liability Company d/b/a CHRISTAL'S,

Plaintiff,

vs.

CITY OF LITTLETON, an incorporated home rule municipal corporation,

Defendant.

ORDER AND MEMORANDUM OF DECISION

(Filed Mar. 31, 2001)

This case involves numerous constitutional challenges to a city ordinance that regulates adult entertainment businesses. Plaintiff Z.J. Gifts alleges that Chapter 14 of the Littleton Municipal Code deprives it of its right to freedom of speech and due process secured by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution, as well as Article II, Sections 10, 15 and 25 of the Colorado Constitution, in violation of 42 U.S.C.A. § 1983 (West 1994 & Supp. 2000). This matter is before the court on: (1) Defendant's "Motion for Summary Judgment" filed June 15, 2000; and (2) Plaintiff's "Brief in Support of Plaintiff's Cross Motion for Partial Summary Judgment and In Opposition to Defendant's Cross Motion for

Summary Judgment" filed July 24, 2000. Jurisdiction is based on 42 U.S.C.A. § 1983.

FACTS

1. General Background

Z.J. Gifts is a Colorado limited liability company doing business under the name "Christal's" at 6502 South Broadway in the City of Littleton. (Mem. Br. in Supp. of Def.'s Mot. for Summ. J., Statement of Facts ¶12 [filed June 15, 2000] [hereinafter "Def.'s Br."]; *admitted at* Br. in Supp. of Pl.'s Cross Mot. for Partial Summ. J. and in Opp'n to Def.'s Cross Mot. for Summ. J., Pl.'s Resp. to Def.'s Undisputed Facts ¶ 12 [filed July 24, 2000] [hereinafter "Pl.'s Br."].) Defendant City of Littleton is a home-rule municipal corporation organized under the laws of the state of Colorado. (Pl.'s Br., Statement of Undisputed Facts ¶ 3; *admitted at* Def.'s Reply Br. in Supp. of Mot. for Summ. J. and Def's Resp. Br. in Opp'n to Pl.'s Cross-Mot. for Summ. J., Def.'s Resp. to Pl.'s Statement of Undisputed Facts ¶ 3 [filed Aug. 24, 2000] [hereinafter "Def.'s Reply"].)

On July 20 and August 3, 1993, the Littleton City Council held public hearings regarding the Ordinance ("Chapter 14") at issue in this case. (Def.'s Br., Statement of Facts ¶¶ 1, 2; *admitted at* Pl.'s Br., Pl.'s Resp. to Def.'s Undisputed Facts ¶¶ 1, 2.) At these hearings, city council members reviewed land use summaries from other cities that documented the adverse secondary impacts that adult entertainment establishments have on adjacent and nearby properties. (*Id.*, Statement of Facts ¶¶ 3, 9; *admitted at* Pl.'s Br., Pl.'s Resp. to Def.'s Undisputed Facts ¶¶ 3, 9.) The council members also

heard testimony regarding the deleterious effects that adult entertainment businesses have on surrounding businesses, property values, and crime rates. (*Id.*, Ex. A [Ordinance].) Based on these findings and others, the Ordinance was passed by a vote of council members on August 3, 1993. (*Id.*, Statement of Facts ¶ 11; *admitted in relevant part at* Pl.'s Br., Pl.'s Resp. to Def.'s Undisputed Facts ¶ 11.)

The City of Littleton covers 7,860 acres of land, which are divided into residential, business, and industrial zones. (*Id.*, Statement of Facts ¶ 4; *admitted in relevant part at* Pl.'s Br., Pl.'s Resp. to Def.'s Undisputed Facts ¶ 4.) Of the 7,860 acres in Littleton, 75.5% is zoned for residential use, 5.3% is zoned for business, and 1.3% is zoned for industrial use. (*Id.*, Statement of Facts ¶ 4; *admitted in relevant part at* Pl.'s Br., Pl.'s Resp. to Def.'s Undisputed Facts ¶ 4.) Of the land that is zoned for business or industrial uses, 19.8% is zoned in the I-1 or I-2 districts. (*Id.*, Statement of Facts ¶ 4; *admitted in relevant part at* Pl.'s Br., Pl.'s Resp. to Def.'s Undisputed Facts ¶ 4.) Plaintiff's business is located in the B-2 district, which is located in a business zone rather than an industrial zone. (Pl.'s Br., Statement of Undisputed Facts ¶ 4; *admitted at* Def.'s Reply, Def.'s Resp. to Pl.'s Undisputed Facts ¶ 4.)

2. Chapter 14

Section 3-14-1 of Chapter 14 states that "purpose and intent of this Chapter is to regulate adult businesses, to promote the health, safety, morals and general welfare of the citizens of the City, and establish reasonable and uniform regulations to prevent the deleterious location and concentration of adult businesses within the City,

thereby reducing or eliminating the adverse secondary effects from such adult businesses." (Compl. for Prelim. and Permanent Injunctive Relief, Declaratory Relief, Damages, and Att'ys Fees, Ex. A [Chapter 14] [filed Aug. 25, 1999] [hereinafter "compl."].)

Section 3-14-4 requires all persons who conduct an adult business to obtain an annual adult business license. (*Id.*, Ex. A [Chapter 14].) Section 3-14-8 requires the city clerk to approve or deny any application for an adult business license within thirty days of the date the application is filed with the city clerk. (*Id.*, Ex. A [Chapter 14].) Under section 3-14-8, the city clerk is compelled to deny a license application for eight detailed reasons:

1. The applicant is under the age of twenty-one years;

2. The applicant has made a false statement upon the application or has given false information in connection with an application;

3. The applicant or any holder of any class of stock, or a director, officer, partner or principal of the applicant has had an adult business license revoked or suspended anywhere within the State within one year prior to the application;

4. The applicant has operated an adult business which has determined to be a public nuisance under State law or this Code within one year prior to the application;

5. A corporate applicant is not in good standing or authorized to do business in the State; or

6. The applicant is overdue in the payment to the City of taxes, fees, fines or penalties assessed against him/her or imposed against him/her to an adult business;

7. The applicant has not obtained required sales tax license;

8. The applicant has been convicted of a specified criminal act.

(*Id.*, Ex. A [Chapter 14].) In the event the city clerk denies a license, the city clerk must make written findings of fact stating the reasons for the denial. (*Id.*, Ex. A [Chapter 14].) An applicant who has been denied a license has the right to a hearing before the city manager within thirty days of the denial. (*Id.*, Ex. A [Chapter 14].) The order of the city manager is final decision and may be appealed to the District Court pursuant to Colorado Rules of Civil Procedure 106(a)(4). (*Id.*, Ex. A [Chapter 14].)

3. Procedural History

On August 25, 1999, plaintiff filed a six-count complaint against defendant for alleged violations of its First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution. (Compl. ¶ 27.) Plaintiff alleges that Chapter 14 of the Littleton Municipal Code is unconstitutional for a variety of reasons. (*Id.* ¶¶ 26-54.) Plaintiff seeks a declaration that Chapter 14 is unconstitutional, a permanent injunction prohibiting Littleton from enforcing Chapter 14, and damages. (*Id.*, Prayer for Relief.)

On June 15, 2000, defendant moved for summary judgment. (Mot. for Summ. J. [filed June 15, 2000].) Defendant contends that Chapter 14 of the Littleton Municipal Code is not unconstitutional because it is a

legitimate time, place and manner restriction designed to serve a substantial governmental interest and it does not unreasonably limit alternative avenues of communication. (Def.'s Br. at 17-28.) Defendant also argues that plaintiff is an adult business store as defined under Chapter 14 and is, therefore, subject to the provisions of Chapter 14, (*Id.* at 10-17.)

On July 24, 2000, plaintiff moved for summary judgment on a variety of grounds. (Pl.'s Br. at 1.) By way of illustration and not limitation, plaintiff argues that Chapter 14 is a content-based regulation and a prior restraint on speech subject to strict judicial review. and that Chapter 14 lacks procedural safeguards required under the First Amendment case law. (*Id.* at 6-10, 10-29). Plaintiff also argues that it is not an adult entertainment establishment as defined by Chapter 14. (*Id.* at 39-47.)

ANALYSIS

1. Legal Standard

Under rule 56(c), the court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986); *Concrete Works, Inc. v. City & County of Denver*, 36 F.3d 1513, 1517 (10th Cir. 1994). The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986). "Once the moving party meets this burden,

the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter." *Concrete Works, Inc.*, 36 F.3d at 1518 (citing *Celotex Corp.*, 477 U.S. at 325, 106 S. Ct. at 2554). The nonmoving party may not rest solely on the allegations in his or her pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324, 106 S. Ct. at 2553; Fed. R. Civ. P. 56(e). The court may consider only admissible evidence when ruling on a summary judgment motion. *See World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir. 1985). The factual record must be viewed in the light most favorable to the nonmoving party. *Concrete Works, Inc.*, 36 F.3d at 1518 (citing *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 [10th Cir. 1990]).

2. *Interpreting Chapter 14*

Initially, I must determine whether Z.J. Gifts is an adult entertainment business as defined by Chapter 14. Section 3-14-2 defines an adult bookstore or novelty store as a commercial establishment which devotes a "significant or substantial" portion of its stock-in-trade or interior floor space to the sale, rental or viewing of items which are characterized by the depiction or description of specified sexual activities or specified anatomical areas. (*Id.*, Ex. A [Chapter 14].) Section 3-14-2 defines specified anatomical areas as "(a) Less than completely and opaquely covered human genitals, pubic region, buttocks, anus, or female breasts below a point immediately above the top of the areolae; or (b) Human male genitals in a discernible turgid state, even if completely and opaquely covered." (*Id.* ¶ 12; *admitted at* Answer and Jury Demand ¶ 6 [filed Sept. 15, 1999] [hereinafter "Answer"].) Section 3-14-2 defines specified sexual activities:

> (a) The fondling or other intentional touching of human genitals, pubic region, buttocks, anus, or female breasts; (b) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy; (c) masturbation, actual or simulated; (d) human genitals in a state of sexual stimulation, arousal, or tumescence; or (e) excretory functions as part of or in connection with any of the activities set forth in subsections (a) through (d) of this definition.

(*Id.* ¶ 13; *admitted at* Answer ¶ 6.)

The term "significant or substantial" is not defined by the Littleton Municipal Code. (*Id.* ¶ 18; *admitted in relevant part at* Answer ¶ 9.) Plaintiff contends that Littleton's failure to define the term "significant and substantial" renders Chapter 14 unconstitutionally vague and overbroad. (Pl.'s Br. at 39-47.) Alternatively, plaintiff requests that I define the term "significant and substantial" in such a manner so that plaintiff does not fall under its definition. (*Id.*) After reviewing the case law and evidence in this case, I find that plaintiff is an adult entertainment establishment subject to the regulations under Chapter 14.

(a) Void for Vagueness Doctrine

Under the void for vagueness doctrine, a plaintiff may challenge a legislative enactment by arguing that it does not provide adequate notice of proscribed conduct. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 56, 96 S. Ct. 2440, 2446 (1976); *15192 Thirteen Mile Road, Inc. v. City*

of Warren, 626 F. Supp. 803, 818 (E.D. Mich. 1985). This doctrine serves a three-fold purpose. *15192 Thirteen Mile Road*, 626 F. Supp. at 818. First, by requiring legislatures to provide adequate notice of prohibited conduct, the doctrine ensures that innocent citizens will not unknowingly become subject to the imposition of criminal penalties. *Greyned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99 (1972). Second, the vagueness doctrine ensures that legislative bodies will not improperly delegate authority or discretion to law enforcement officials. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S. Ct. 839 (1972). By requiring legislatures to provide minimal guidelines to govern law enforcement, the vagueness doctrine protects against the imposition of criminal sanctions based on personal predilections of individual policemen, prosecutors or judges. *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S. Ct. 1855, 1859 (1983). Third, the vagueness doctrine prevents vague laws from chilling First Amendment expression. *15192 Thirteen Mile Road*, 626 F. Supp. at 818.

An ordinance must "delineate its reach in words of common understanding so that ordinary people can understand what conduct is prohibited." *Cameron v. Johnson*, 390 U.S. 611, 616, 88 S. Ct. 1335, 1338 (1968); *Acorn v. City of Tulsa, Okla.*, 835 F.2d 735, 740 (10th Cir. 1987). In *Smith v. Goguen*, 415 U.S. 566, 94 S. Ct. 1242 (1974), Justice Powell wrote that:

> [t]he doctrine incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement. Where a statute's literal scope, unaided by a narrowing

> state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.

Id. at 573, 94 S. Ct. at 1247. The general test for vagueness applies with particular force in review of laws dealing with speech. *15192 Thirteen Mile Road*, 626 F. Supp. at 818. "Stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech." *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620, 96 S. Ct. 1755, 1760 (1976) (quoting *Smith v. California*, 361 U.S. 147, 151, 80 S. Ct. 215, 217 [1959]).

The void for vagueness doctrine focuses on whether an ordinance is drafted in such a manner that the very existence of the ordinance may cause persons not before the court to refrain from engaging in constitutionally protected speech. *Young*, 427 U.S. at 59, 96 S. Ct. at 2447; *Broadrick v. Oklahoma*, 413 U.S. 601, 611-14, 93 S. Ct. 2908, 2915-17 (1973). The vagueness doctrine is justified by the overriding importance of maintaining a free and open market for the interchange of ideas. *Id.*, 96 S. Ct. at 2447. With these principles in mind, I now address plaintiff's argument that Chapter 14 is void for vagueness because Littleton failed to define the term "significant or substantial."

In *15192 Thirteen Mile Road*, the plaintiff made a similar challenge to a Detroit ordinance that used the term "significant or substantial." 626 F. Supp. at 818. The court held that the term significant or substantial is reasonably specific and precise, "bearing in mind that unavoidable imprecision is not fatal and celestial precision is not necessary." *Id.* at 819 (quoting *Hart Book Stores,*

Inc. v. Edminsten, 612 F.2d 821, 833 [4th Cir. 1983]). The court noted that the term substantial has been used in numerous statutory schemes. *Id.* (noting that the term "substantial" appears in the United States Code roughly 1157 times and "substantial portion" appears fifty-one times in the United States Code); *Busch v. Service Plastics, Inc.*, 261 F. Supp. 136, 141 (N.D. Ohio 1966).

I am persuaded by the court's opinion in *15192 Thirteen Mile Road* that the term "significant or substantial" is constitutionally precise. Chapter 14 clearly defines the conduct, services and activities that it considers to be adult in nature. The determination of how many of these services are required for one to become an adult entertainment business is a difficult line-drawing problem that is best resolved by the courts on a case-by-case basis. Furthermore, Chapter 14 is not so vague that its very existence would cause persons not before the court to refrain from engaging in constitutionally protected speech. *Id.*, 96 S. Ct. at 2447. The free and open market for the interchange of ideas in Littleton has not been affected by the clarity of Chapter 14.

Even if I were inclined to strike Chapter 14 as unconstitutional because of Littleton's failure to define the term significant or substantial, which I am not, the Supreme Court decision in *Young* prevents me from doing so. In *Young*, the plaintiffs made a similar challenge to a zoning ordinance as plaintiff has made in this case. The plaintiffs in *Young* did not attack the specificity of the definition of "specified sexual activities" or "specified anatomical areas," but rather argued that they could not determine how much of the described activities may be permissible before it falls within the scope of the ordinance. *Young*, 427 U.S. at 56, 96 S. Ct. at 2446. The Supreme Court

denied the plaintiffs challenge on two grounds. *Id.* at 56-57, 96 S. Ct. at 2446. First, the Court stated that it was unnecessary to consider the validity of the plaintiffs' arguments, for even if there may be some uncertainty about the effect of the ordinance on other litigants, the ordinance unquestionably applied to the plaintiffs. *Id.*, 96 S. Ct. at 2446. The Supreme Court noted that the plaintiffs offered adult fares on a regular basis, and therefore, any element of vagueness in these ordinances did not affect the plaintiffs. *Id.*, 96 S. Ct. at 2446. Second, the court stated that, in any event, the plaintiffs did not have standing to challenge the constitutionality of the ordinance because the plaintiffs' rights were not affected. *Id.*, 96 S. Ct. at 2446.

Similarly, in this case, it is unnecessary to address plaintiff's void for vagueness argument because even if there may be some uncertainty about the effect of the ordinance on other litigants, the ordinance unquestionably applies to plaintiffs. Plaintiff admits that it prohibits children under the age of eighteen from entering its store. (Def.'s Br., Statement of Facts ¶ 31; *admitted at* Pl.'s Br., Pl.'s Resp. to Def.'s Undisputed Facts ¶ 31.) Accordingly, plaintiff obviously considers itself to be in the business of selling goods and services for adult use only. Furthermore, plaintiff admits that, at the very least, thirty-three percent of its inventory is adult in nature.[1] (*Id.*, Statement of Facts

[1] Plaintiff's estimate that thirty-three percent of its business is adult or sexual in nature appears to be far below the actual figure. Defendant has submitted evidence suggesting that the portion of plaintiff's inventory that is sexual and adult in nature is closer to fifty percent. (Def.'s Br., Ex. D [Video], Ex. E [Photographs], Ex. F [Inventory List], Ex. G [Expert Reports].) After reviewing the photographs

(Continued on following page)

¶ 32; *admitted at* Pl.'s Br., Pl.'s Resp. to Def.'s Undisputed Facts ¶ 32.) One-third of a store's inventory can hardly be considered insubstantial. Accordingly, I find that Chapter 14 unquestionably applies to plaintiff in this case.

Furthermore, plaintiff does not have standing to challenge the precision of the language contained within Chapter 14. In *Young*, the Supreme Court stated that the plaintiffs did not have standing to challenge the constitutionality of the ordinance because the plaintiffs' rights were not affected. *Id.*, 96 S. Ct. at 2446. The court stated that if the "statute's deterrent effect on legitimate expression is not both real and substantial, and if the statute is readily subject to a narrowing construction by the state courts, the litigant is not permitted to assert the right of third parties." *Id.*, 96 S. Ct. at 2446. Chapter 14 is not a total ban on operating adult entertainment businesses in Littleton, nor does it have a real and substantial deterrent effect on legitimate expression. Furthermore, the "significant or substantial" term in Chapter 14, at the very least, is readily subject to a narrowing construction by the state courts of Colorado. Accordingly, consistent with the Supreme Court's opinion in *Young*, I find that plaintiff does not have standing to challenge the constitutionality of Chapter 14 under the void for vagueness doctrine.

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taken of the display cases in plaintiff's store and the video segment touring the store, I find plaintiff's argument that it is not an adult entertainment establishment frivolous at best. To define plaintiff as anything other than an adult entertainment business would be absurd and totally devoid of any basis on the record.

(b) Void for Over breadth Doctrine

Unlike the void for vagueness doctrine, the over-breadth doctrine is not rooted in due process notions of fair notice. *15192 Thirteen Mile Road*, 626 F. Supp. at 821. Rather, its purpose is to ensure that governmental actions "to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Id.* (quoting *NAACP v. Alabama*, 377 U.S. 288, 307, 84 S. Ct. 1302, 1313 (1958). A plaintiff has standing to challenge a legislative enactment on over-breadth grounds as long as the legislation is capable of reaching constitutionally protected speech. *Broadrick*, 413 U.S. 601, 93 S. Ct. 2908. "Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect . . . cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe." *Alderman v. U.S.*, 394 U.S. 165, 174-75, 89 S. Ct. 961, 970-71 (1969).

Although the two doctrines are conceptually distinct, plaintiff has largely intertwined its vagueness and over breadth arguments. Because plaintiff's argument most closely resembles a void-for-vagueness challenge, I find that the crux of plaintiff's challenge to Chapter 14 is that it is impermissibly vague. Nevertheless, even if plaintiff meant to challenge Chapter 14 on the ground that it is over-broad, this argument must fail. Littleton clearly specified the conduct that Chapter 14 regulates. The terms "specified sexual activities" and "specified anatomical areas" are clearly defined under Chapter 14. Littleton has not attempted to regulate conduct under Chapter 14 that

is outside the scope of its constitutional authority. It is undisputed that Littleton has the power to regulate the time, place, and manner which people operate an adult entertainment business in Littleton. *Young,* 427 U.S. at 56, 96 S. Ct. at 2446. As for the term "significant or substantial," the courts can prevent the over-broad application of Chapter 14 that otherwise might arise from an over-inclusive interpretation of the term "significant or substantial" simply by giving the term its reasonable and intended meaning.

(c) "Significant or Substantial"

Plaintiff requests that I define the term "significant or substantial" in a manner such that it does not fall under the definition of an adult entertainment business. In support of its argument, plaintiff emphasizes that it sells cross-over or secondary products in conjunction with its undeniably predominant stock of adult goods. Despite plaintiff's attempt to portray itself as merely a retail store that also sells adult products, I find that, under the facts of this case, plaintiff is an adult entertainment business as defined under Chapter 14 of the Littleton Municipal Code. As I indicated above, thirty-three percent is a significant or substantial portion of a store's inventory. Furthermore, after reviewing the photographs taken of the display cases in plaintiff's store and the video segment touring the store, I find plaintiff's argument that a significant or substantial

portion of its inventory is not adult in nature frivolous at best.[2]

3. Constitutional Challenges to Chapter 14

Plaintiff brings this suit under section 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws [of the United States], shall be liable to the party injured . . .

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[2] It appears as though plaintiff in this case was also the plaintiff in *Z. J. Gifts v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998). In *Z. J. Gifts*, the issue of whether Z. J. Gifts was operating an adult entertainment business was uncontested. *Id.* at 686 (stating "given the uncontroverted sexual nature of Z. J. Gifts' business, we are convinced the city has met its burden"). I am disturbed by the frivolous and incredulous arguments asserted by plaintiff in this case. I remind counsel of the provisions of Fed. R. Civ. P. 11:

> By presenting to the court . . . a . . . written motion, . . . an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; [and]
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

42 U.S.C.A. § 1983. Plaintiff alleges that Chapter 14 of the Littleton City Code deprives plaintiff of its right to freedom of speech and due process secured by the First, Fifth, Ninth and Fourteenth Amendments to the Untied States Constitution. (Compl. ¶¶ 27, 30.)

The First Amendment provides that Congress "shall make no law . . . abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST amend. I. The Fourteenth Amendment makes that prohibition applicable to the State of Colorado. *Meyer v. Grant,* 486 U.S. 414, 420, 108 S. Ct. 1886, 1891 (1988). "The freedom of speech and of the press which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State." *Thornhill v. Alabama*, 310 U.S. 88, 95, 60 S. Ct. 736, 740 (1940).

The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484, 77 S. Ct. 1034, 1308 (1957). The freedom of speech guaranteed by the Constitution embraces the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. *Grant*, 486 U.S. at 420, 108 S. Ct. at 1891. Courts have recognized that governmental limitations which limit expressive interests strike "[a]t the heart of the First Amendment." *Turner Broadcasting, Inc. v. FCC*, 512 U.S. 622, 641, 114 S. Ct. 2445, 2458 (1994). Like most rights, however, plaintiffs' first amendment rights are not absolute. *Buckley v. American*

Constitutional Law Foundation, Inc., 525 U.S. 182, 191, 119 S. Ct. 636, 642 (1999); *Buckley v. Valeo*, 424 U.S. 1, 45, 96 S. Ct. 612, 647 (1976); *American Constitutional Law Foundation, Inc. v. Meyer,* 120 F.3d 1092, 1097 (10th Cir. 1997); *Krislov*, 226 F.3d at 859. Courts are "aware that First Amendment doctrine must be informed by the complex tangle of social, political, and cultural interests in limiting speech as well as protecting it, for the tension between the individual rights and community needs is at the core of every First Amendment issue." *Z. J. Gifts v. City of Aurora*, 136 F.3d 683, 685 (10th Cir. 1998).

Plaintiff makes several unsubstantiated arguments in support of its contention that Chapter 14 is unconstitutional. (Pl.'s Br. at 10-49.) Rather than address each and every unsubstantiated argument plaintiff makes, I will briefly discuss the case law that dictates the result in this case. Despite plaintiff's attempts to escape the grips of Chapter 14, I find that Chapter 14 is constitutional and applies to plaintiff in this case.

a. Chapter 14 Zoning Regulations

As an initial matter, I must determine whether Chapter 14 is a content-based or a content-neutral zoning regulation. Content-based restrictions on speech – those which suppress, disadvantage, or impose differential burdens upon speech because of its content – are subject to the most exacting scrutiny. *Turner*, 512 U.S. at 642, 114 S. Ct. at 2459; *Z. J. Gifts*, 136 F.3d at 685. The Supreme Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 45, 106 S. Ct.

925, 928 (1985); *Carey v. Brown*, 447 U.S. 455, 462-63, 100 S. Ct. 2286, 2291 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S. Ct. 2286, 2289 (1972). Conversely, content-neutral regulations pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue because they are unrelated to the content of the speech. *Turner*, 512 U.S. at 642, 114 S. Ct. at 2459; *Z. J. Gifts*, 136 F.3d at 685. Content-neutral regulations are accordingly subject to intermediate scrutiny. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 3068-69 (1984); *Z. J. Gifts*, 136 F.3d at 685. Content-neutral time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. *City of Renton*, 475 U.S. at 45, 106 S. Ct. at 928; *Clark*, 468 U.S. at 293, 104 S. Ct. at 3069; *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440 (1976).

In determining whether an ordinance is content-neutral and subject to intermediate scrutiny, the city's purpose in enacting the ordinance is the controlling consideration. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754 (1989); *Z. J. Gifts*, 136 F.3d at 685-86. If the regulation "serves purposes unrelated to the content of expression it is considered neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* at 791, 109 S. Ct. at 2754; *City of Renton*, 475 U.S. at 47-48, 106 S. Ct. at 928-29; *Z. J. Gifts*, 136 F.3d at 686. The city may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. *Mosley*, 408 U.S. at 95-96, 92 S. Ct. at 2289-90. On the other hand, however, "[i]t is a familiar principle of

constitutional law that [the Supreme Court] will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383-84, 88 S. Ct. 1673, 1683 (1968).

Despite plaintiff's attempt to subject Chapter 14 to strict judicial scrutiny, the Supreme Court and the Tenth Circuit have made it abundantly clear that ordinances such as the one in this case are not subject to strict scrutiny. *See City of Renton*, 475 U.S. at 45, 106 S. Ct. at 928; *Clark*, 468 U.S. at 293, 104 S. Ct. at 3069; *Young*, 427 U.S. at 52, 96 S. Ct. at 2442; *Z. J. Gifts*, 136 F.3d at 685-86. The Supreme Court has long held that city zoning ordinances which place limits on the location of adult uses are valid exercises of the city's police powers. *Young*, 427 U.S. at 62-63, 96 S. Ct. at 2448-49. Though such regulations treat adult uses differently from other uses based on their sexually explicit nature, they are designed to prevent crime, maintain property values, and preserve the equality of urban life. *City of Renton*, 475 U.S. at 48, 106 S. Ct. at 929. So long as cities do not use "the power to zone as a pretext for suppressing expression, attempts to regulate the adverse effects associated with sexually oriented businesses are properly classified as content-neutral." *Z. J. Gifts*, 136 F.3d at 686 (quoting *City of Renton*, 475 U.S. at 54, 106 S. Ct. at 932). Accordingly, because ordinances zoning adult uses are intended to curb the secondary effects of those uses on surrounding communities and burden free speech interests only incidentally, they are generally reviewed as content-neutral regulations subject to a less stringent standard of review. *Id.*

Properly analyzed as a content-neutral regulation, Littleton's zoning ordinance survives constitutional scrutiny if Littleton can establish that the ordinance is

narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels of communication. *See City of Renton*, 475 U.S. at 45, 106 S. Ct. at 927-28. For the following reasons, I hold that Chapter 14 is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels of communication.

(i) Significant Governmental Interest

The Supreme Court has long held that Littleton's stated interests in circumscribing the adverse secondary effects of sexually oriented businesses must be accorded high respect. *See City of Renton*, 475 U.S. at 45, 106 S. Ct. at 928; *Clark*, 468 U.S. at 293, 104 S. Ct. at 3069; *Young*, 427 U.S. at 52, 96 S. Ct. at 2442; *Z. J. Gifts*, 136 F.3d at 685-86. The record clearly establishes that the City of Littleton intended to regulate the harmful secondary effects of sexually oriented businesses. (Def.'s Br., Ex. A [Chapter 14, attach. 1 (Transcript of City Council Hearing on August 3, 1993), attach. 2 (Case Law Summaries Reviewed by City Council)].) The city council reviewed several land use summaries which found that adult businesses increase crime rates, lower property values, and reduce the quality of life in a community. (Def.'s Br., Statement of Facts ¶ 3; *admitted at* Pl.'s Br., Pl.'s Resp. to Def.'s Undisputed Facts ¶ 3.) Accordingly, I find that Littleton has a significant governmental interest in regulating the time, manner and place in which adult entertainment establishments operate their business.

Furthermore, Littleton need not wait for sexually oriented businesses to locate within its boundaries, depress property values, increase crime, and spread sexually

transmitted diseases before it regulates those businesses. *Z. J. Gifts,* 136 F.3d at 687. Littleton may, and in fact did, rely on the experience of other cities to determine whether the harm presented by sexually oriented businesses are real and should be regulated. *Id.* Moreover, Littleton need only rely upon evidence reasonably believed to be relevant to the problem that the city addresses. *City of Renton*, 475 U.S. at 51-52, 106 S. Ct. at 931. If Littleton can show that the ordinance affects that category of businesses shown to produce the unwanted secondary effects, the ordinance will stand. *Id.* at 52, 106 S. Ct. at 931. Based on my review of the record, I find that Littleton enacted Chapter 14 to regulate the secondary effects of adult businesses, and that Littleton has a significant governmental interest in regulating these secondary effects.

(ii) Narrowly Tailored

Time, place and manner regulations must be narrowly tailored, but "need not be the least restrictive or least intrusive means of doing so." *Rock Against Racism*, 491 U.S. at 798, 109 S. Ct. at 2757-58. "So long as the means chosen are not substantially broader than necessary, an ordinance is narrowly tailored if the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation. *Id.* at 799, 109 S. Ct. at 2758-59. It is not the court's function to appraise the wisdom of the city's decision. *City of Renton*, 475 U.S. at 52, 106 S. Ct. at 931. Because legislative bodies are entitled to reasonable inferences suggested by the legislative record before them, the court simply determines whether the ordinance affects only categories of businesses reasonably believed to produce at least some of the unwanted secondary effects the city seeks to regulate. *Turner*, 512

U.S. at 666, 114 S. Ct. at 2471. Courts must allow cities like Littleton a reasonable opportunity to experiment with solutions to serious problems. *Young*, 427 U.S. at 71, 96 S. Ct. at 2453.

Based on evidence already cited herein, I find that Littleton reasonably believes that adult entertainment businesses produce at least some of the unwanted secondary effects the city seeks to regulate, and that Chapter 14 is narrowly tailored to eliminate or minimize the secondary effects of adult entertainment businesses.

(iii) Ample Alternative Avenues of Communication

The First Amendment requires only that Littleton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult entertainment business within the city. *City of Renton*, 475 U.S. at 54, 106 S. Ct. at 930. Plaintiff cannot dispute that it has a reasonable opportunity to operate its business in Littleton. Chapter 14 is not a total ban on adult businesses. Sexually oriented businesses may locate within the city's industrial zone, which comprise approximately 1.3% of the city's land. *See Lakeland Lounge of Jackson, Inc. v. City of Jackson,* 973 F.2d 1255, 1260 (5th Cir. 1992) (holding that 1.2% of the land constitutes reasonable alternative avenues of communication) *cited with approval in Z. J. Gifts*, 136 F.3d at 688. Furthermore, there is not another adult entertainment business in the City of Littleton. (Def.'s Bar., Statement of Facts ¶ 35; *admitted at* Pl.'s Br., Pl.'s Resp. to Def.'s Undisputed Facts ¶ 35.) Accordingly, the restriction under Chapter 14 prohibiting plaintiff from operating an adult entertainment business within one

thousand feet of another adult entertainment business does not restrict the use of the land within the 1.3% zoned for adult uses.

It is clear from the record that Littleton has not used the power to zone as a pretext for suppressing expression, but rather has sought to make some areas available for adult entertainment businesses and their patrons, while at the same time preserving the quality of life in the community at large by preventing those businesses from locating in other areas. Plaintiff has the opportunity to operate its business in Littleton, just not in the B-2 district in which it is presently located. Accordingly, I find that Chapter 14 leaves open ample alternative channels of communication.

(b) Chapter 14 Licensing Regulations and Prior Restraints

Pursuant to Littleton's police powers, Littleton may require a party to obtain a license prior to operating an adult entertainment business. *Young*, 427 U.S. at 71, 96 S. Ct. at 2453. Whether Littleton's licensing regulations pass constitutional muster, however, depends largely on whether Chapter 14 can be characterized as a prior restraint on protected speech. *Id.* at 71, 96 S. Ct. at 2453. While prior restraints are not unconstitutional *per se*, any system of prior restraint bears a heavy presumption against its constitutional validity. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224, 110 S. Ct. 596, 604 (1990).

Cases addressing prior restraints have identified two evils that will not be tolerated in such schemes. *FW/PBS*, 493 U.S. at 224, 110 S. Ct. at 604 (1990). First, a scheme

that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 108 S. Ct. 2138, 2143 (1988). "It is settled by a long line of recent decisions of [the Supreme Court] that an ordinance which makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon enjoyment of those freedoms." *See Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51, 89 S. Ct. 935, 938-39 (1969).

Second, a prior restraint that fails to place limits on the time within which the decision maker must issue the license is impermissible. *Freedman v. State of Md.*, 380 U.S. 51, 57, 85 S. Ct. 734, 738 (1965). A licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure the prompt issuance of the license. *FW/PBS*, 493 U.S. at 226, 110 S. Ct. at 605. In *FW/PBS*, the Supreme Court held that two procedural safeguards are necessary to ensure the expeditious decision-making by a licensor: (1) the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained; and (2) there must be the possibility of prompt judicial review in the event that the license is erroneously denied. *Id.*, 493 U.S. at 226, 110 S. Ct. at 605.

Based on my review of the record, I find that Chapter 14 meets both of these requirements, is not a prior restraint on protected speech, and is, therefore, constitutional. First, Chapter 14 identifies eight specific reasons

which require the city clerk to deny a license application. (Def.'s Br., Ex. A [Chapter 14, Section 3-14-8].) Accordingly, the Littleton city clerk does not have unbridled discretion to approve or deny a license application. Second, Chapter 14 clearly requires the city clerk to either approve or deny a license application within thirty days of receiving the application, and also provides for prompt judicial review of license denials. (*Id.*, Ex. A [Chapter 14, Section 3-14-8].) In the event the city clerk denies a license, Chapter 14 requires the clerk to make written findings of fact stating the reasons for the denial. (*Id.*, Ex. A [Chapter 14, Section 3-14-8].) If the applicant is not satisfied with the city clerk's findings, the applicant, upon request, has a right to a hearing before the city manager within thirty days of the clerk's decision. (*Id.*, Ex. A [Chapter 14, Section 3-14-8].) The order of the city manager is a final decision and may be appealed to the District Court pursuant to Colorado Rules of Civil Procedure 106(a)(4). *See City of Colorado Springs v. 2354, Inc.*, 896 P.2d 272, 284 (Colo. 1995) (holding that Colorado Rules of Civil Procedure 106(a)(4) provides "adequate procedural safeguards and an avenue for prompt judicial review so as to minimize suppression of speech in the event of a license denial.")

Based on the foregoing, I hold that Chapter 14 is constitutional as it is applied to plaintiff in this case. Accordingly, I deny plaintiff's motion for summary judgment and grant defendant's motion for summary judgment.

3. Conclusion

Based on the foregoing, it is therefore

ORDERED as follows:

1. Defendant's motion for summary judgment (#27) is GRANTED.

2. Plaintiff's motion for partial summary judgment (#33) is DENIED.

3. Defendant shall have its costs upon submission of a bill of costs in accordance with D. C. Colo. L. R. 54.1.

* * *

6. This case is hereby DISMISSED.

Dated this 30 day of March 2001.

BY THE COURT:
/s/ Edward W. Nottingham
EDWARD W. NOTTINGHAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-N-1696

CERTIFICATE OF MAILING

I hereby certify that a copy of the Order and Memorandum of Decision signed by Judge Edward W. Nottingham on March 30, 2001, was served on ~~April~~ March 31, 2001, by hand delivery, where a "D.C." box number or asterisk is indicated after the recipient's name, or otherwise by depositing it in the United States mail, postage prepaid, addressed to the recipient:

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Magistrate Judge O. Edward Schlatter*

JAMES R. MANSPEAKER,
CLERK

By /s/ Edward Butler
Deputy Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Z. J. GIFTS D-4, L.L.C., a Colorado Limited Liability Company, doing business as Christal's, Plaintiff-Appellant, v. CITY OF LITTLETON, an Incorporated Home Rule Municipal Corporation, Defendant-Appellee.	No. 01-1220

ORDER
Filed February 5, 2003

Before **TACHA**, Chief Judge, **BRORBY**, Senior Circuit Judge, **SEYMOUR, EBEL, KELLY, HENRY, BRISCOE, LUCERO, MURPHY, HARTZ, O'BRIEN** and **MCCONNELL**, Circuit Judges.

Appellee's petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. A poll was requested and a majority of the active

judges voted to deny rehearing en banc. Judges Tacha, O'Brien, and McConnell voted to grant rehearing en banc.

Entered for the Court,
PATRICK FISHER, Clerk

By /s/ Karen Phillips
Deputy Clerk

Fed. R. Civ. P. RULE 106. FORMS OF WRITS ABOLISHED

(a) Habeas Corpus, Mandamus, Quo Warranto, Certiorari, Prohibition, Scire Facias and Other Remedial Writs in the District Court. Special forms of pleadings and writs in habeas corpus, mandamus, quo warranto, certiorari, prohibition, scire facias, and proceedings for the issuance of other remedial writs, as heretofore known, are hereby abolished in the district court. Any relief provided hereunder shall not be available in the superior or county courts. In the following cases relief may be obtained in the district court by appropriate action under the practice prescribed in the Colorado Rules of Civil Procedure:

(1) Where any person not being committed or detained for any criminal or supposed criminal matter is illegally confined or restrained of his liberty;

(2) Where the relief sought is to compel a lower judicial body, governmental body, corporation, board, officer or person to perform an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such lower judicial body, governmental body, corporation, board, officer, or person. The judgment shall include any damages sustained;

(3) When any person usurps, intrudes into, or unlawfully holds or exercises any office or franchise, the district attorney of the proper district may and, when directed by the governor so to do, shall bring an action against such person in the name of the people of the state,

but if the district attorney declines so to do, it may be brought upon the relation and complaint of any person. The Rule heretofore existing requiring leave of court to institute such proceedings is hereby abolished. When such an action is brought against a defendant alleged to have usurped, intruded into, or who allegedly unlawfully holds or exercises any public office, civil or military, or any franchise it shall be given precedence over other civil actions except similar actions previously commenced. The judgment may determine the rightful holder of the office or franchise;

(4) Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdictions or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law:

(I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

(II) Review pursuant to this subsection (4) shall be commenced by the filing of a complaint. An answer or other responsive pleading shall then be filed in accordance with the Colorado Rules of Civil Procedure.

(III) If the complaint is accompanied by a motion and proposed order requiring certification of a record, the court shall order the defendant body or officer to file with the clerk on a specified date, the record or such portion or transcript thereof as is identified in the order, together with a certificate of authenticity. The date for filing the record shall be after the date upon which an answer to the complaint must be filed.

(IV) Within twenty days after the date of receipt of an order requiring certification of a record, a defendant may file with the clerk a statement designating portions of the record not set forth in the order which it desires to place before the Court. The cost of preparing the record shall be advanced by the plaintiff, except that the Court may, on objection by the plaintiff, order a defendant to advance payment for the costs of preparing such portion of the record designated by the defendant as the Court shall determine is unessential to a complete understanding of the controversy; and upon a failure to comply with such order, the portions for which the defendant has been ordered to advance payment shall be omitted from the record. Any party may move to correct the record at any time.

(V) The proceedings before or decision of the body or officer may be stayed, pursuant to Rule 65 of the Colorado Rules of Civil Procedure.

(VI) Where claims other than claims under this Rule are properly joined in the action, the Court shall determine the manner and timing of proceeding with respect to all claims.

(VII) A defendant required to certify a record shall give written notice to all parties, simultaneously with filing, of the date of filing the record with the clerk. The plaintiff shall file, and serve on all parties, an opening brief within forty days after the date on which the record was filed. If no record is requested by the plaintiff, the plaintiff shall file an opening brief within forty days after the defendant has served its answer upon the plaintiff. The defendant may file and serve an answer brief within thirty days after service of the plaintiff's brief, and the plaintiff may file and serve a reply brief to the defendant's answer brief within fifteen days after service of the answer brief.

(VIII) The Court may accelerate or continue any action which, in the discretion of the Court, requires acceleration or continuance.

(IX) In the event the Court determines that the governmental body, officer or judicial body has failed to make findings of fact or conclusions of law necessary for a review of this action, the Court may remand for the making of such findings of fact or conclusions of law.

(5) When judgment is recovered against one or more of several persons jointly indebted upon an obligation, and it is desired to proceed against the persons not originally served with the summons who did not appear in the action. Such persons may be cited to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons, and in his answer any such person may set up any defense either to the original obligation or which may have arisen subsequent to judgment, except a discharge from the original liability by the statute of limitations.

(b) Limitations as to Time. Where a statute provides for review of the acts of any governmental body or officer or judicial body by certiorari or other writ, or for a proceeding in quo warranto, relief therein provided may be had under this Rule. If no time within which review may be sought is provided by any statute, a complaint seeking review under subsection (a)(4) of this Rule shall be filed in the district court not later than thirty days after the final decision of the body or officer. A timely complaint may be amended at any time with leave of the court, for good cause shown, to add, dismiss or substitute parties, and

such amendment shall relate back to the date of filing of the original complaint.

Amended eff. Jan. 1, 1986.

CITY OF LITTLETON, COLORADO

ORDINANCE NO. 27

Series of 1993

INTRODUCED BY COUNCILMEMBERS: EMLEY AND REYNOLDS

AN ORDINANCE OF THE CITY OF LITTLETON, COLORADO, CONCERNING ZONING AND PERFORMANCE REQUIREMENTS FOR ADULT ENTERTAINMENT ESTABLISHMENT

WHEREAS, adult businesses in the City of Littleton would require special supervision from public safety and health agencies in order to protect and preserve the health, safety and welfare of the patrons of such businesses as well as the citizens of the City;

WHEREAS, the City Council and staff have reviewed land use studies or summaries concerning the secondary effects of adult businesses in other cities around the United States including, but not limited to, Garden Grove, California (1991); Phoenix, Arizona (1986); Minneapolis, Minnesota (1980); Houston, Texas (1983); Indianapolis, Indiana (1984); Amarillo, Texas (1977); Los Angeles, California (1977); Cleveland, Ohio (1977); Austin, Texas (1986); Seattle, Washington (1989); Oklahoma City, Oklahoma (1986); Beaumont, Texas (1982); and Whittier, California (1978);

WHEREAS, from a review of these studies and surveys and testimony heard, there is convincing documented evidence that adult businesses, because of their very nature, have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing among other adverse

secondary effects, increased crime a depreciation of property values;

WHEREAS, it is recognized that adult businesses, due to their nature, have serious objectionable operational characteristics, particularly when they are operating in close proximity to each other, thereby contributing to crime, lower property values, urban blight and downgrading of the quality of life in the adjacent area;

WHEREAS, the Council finds that adult businesses are frequently used for sexual liaisons of a casual nature and unlawful sexual activities including prostitution;

WHEREAS, increased crime and unhealthy conduct tend to accompany, concentrate around and be aggravated by adult businesses including, but not limited to, prostitution, pandering, exposing minors to harmful materials, possession and distribution of obscene materials and child pornography, possession and sale of controlled substances and violent crimes against persons and property;

WHEREAS, concern over sexually transmitted diseases, including AIDS, is a legitimate health concern of the City which demands reasonable regulation of adult business in order to protect the health and well being of the citizens;

WHEREAS, the City Council has considered in part, each of the following matters:

(a) areas within close walking distance of single and multiple family dwellings should be free of adult business uses;

(b) areas where children could be expected to walk, patronize, or frequent should be free of adult business uses;

(c) adult business uses should be located in areas of the City which are not in close proximity to residential uses, churches, parks or other public facilities and schools;

(d) the image of the City as a pleasant attractive place to reside will be adversely affected by the presence of adult business uses in close proximity to residential land uses, churches, parks and other public facilities, and schools;

(e) adult business uses should be regulated by zoning to separate them from other dissimilar or incompatible uses just as any other land use should be separated from uses with characteristics different or incompatible from itself;

(f) residents of the City and persons who are non-residents but come to the City for shopping and other commercial needs will move from the community or shop elsewhere if adult business are allowed to locate in close proximity to residential uses, churches, parks, and other public facilities, and schools;

(g) no evidence has been presented to show that the location of adult businesses within the commercial areas of the City will improve the commercial viability or quality of life of the community;

WHEREAS, zoning, licensing and other police power regulations are legitimate reasonable means of accountability to ensure that the operators of adult businesses comply with reasonable regulations and that such businesses are located in places that minimize the adverse secondary effects which historically have accompanied their operation;

WHEREAS, the Council finds that there would be a deterioration in the quality of businesses which chose to operate in and around adult businesses;

WHEREAS, the Council desires to minimize and control these adverse secondary effects and thereby protect the health, safety and welfare of the citizens by protecting the citizens from increased crime; preserving the quality of life, property values and the character of neighborhoods and businesses; deterring the spread of urban blight; and protecting against the spread of communicable and social diseases;

WHEREAS, the Council has considered the decisions of the United States Supreme Court and the Colorado Supreme Court regarding regulation of adult businesses, including but not limited to, *Young* v. *American Mini-Theatres, Inc.*, 427 U.S. 50 (1976) *reh. denied* 429 U.S. 873; *Renton* v. *Playtime Theatres*, 475 U.S. 41 (1986) *reh. denied* 475 U.S. 1132; *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215 (1990); *Barnes* v. *Glen Theatre*, ___ U.S. ___, 111 S. Ct. 2456 (1991); *7250 Corp.* v. *Board of County Cm'rs*, 799 P.2d 917 (Colo. 1990); and *Regency Services* v. *Board of County Com'rs*, 819 P.2d 1049 (Colo. 1991);

WHEREAS, the Council has determined that locational criteria alone do not adequately protect the health, safety and general welfare of the people of the City, and thus certain requirements with respect to the ownership and operation of adult businesses are in the public interest;

WHEREAS, the Council, consistent with limitations on the sale of alcohol, further finds that restricted hours of operation will further prevent the adverse secondary effects of adult business;

WHEREAS, it is not the intent of this ordinance to suppress any speech activities protected by the First Amendment or the Colorado Constitution, but to enact a content neutral ordinance which addresses the adverse secondary effects of adult businesses; and

WHEREAS, it is not the intent of the Council to condone or legitimize the distribution of obscene material, and the Council recognizes that state law prohibits the distribution of obscene materials and expects and encourages law enforcement officials to enforce state obscenity statutes against such illegal activities in the City.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LITTLETON, COLORADO, THAT:

Section 1: Title 10, Chapter 1, Section 2 of the Littleton City Code, the definition of "Adult Entertainment", is hereby repealed:

Section 2: Title 10, Chapter 8, Section 2, Subsection (D) of the Littleton City Code is hereby repealed.

Section 3: Title 10, Chapter 3, Section 2, Land Use category 11.14 of the Littleton City Code is hereby amended to read:

| | | |

3-14-4: License Required – Fee
3-14-5: License Application
3-14-6: Application Fee
3-14-7: Investigation
3-14-8: Approval/Denial of License
3-14-9: Term of License
3-14-10: License Renewal
3-14-11: Suspension or Revocation of License
3-14-12: Display – Transferability – Change of Ownership – Change
3-14-13: Manager – Change of Manager
3-14-14: Hours of Operation
3-14-15: Standards of Conduct
3-14-16: Age Restriction
3-14-17: Lighting Requirements
3-14-18: Right of Entry
3-14-19: Exemptions Generally

3-14-1: PURPOSE

The purpose and intent of this chapter is to regulate adult businesses to promote the health, safety, morals, and general welfare of the citizens of the City, and to establish reasonable and uniform regulations to prevent the deleterious location and concentration of adult businesses within the City, thereby reducing or eliminating the adverse secondary effects from such adult businesses. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including adult materials. Similarly, it is not the intent nor effect of this chapter to restrict or deny access by adults to adult materials protected by the First Amendment or the Colorado Constitution, or to deny access by the distributors and exhibitors of adult entertainment to their intended market. Neither is it the intent nor effect of this chapter to condone or legitimize the distribution of obscene material.

3-14-2: DEFINITIONS:

ADULT ARCADE: An establishment where, for any form of consideration, one or more still or motion picture projectors, slide projectors, or similar machines, or other image producing machines, for viewing by five or fewer persons each, are used to show films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas".

ADULT BOOKSTORE, ADULT NOVELTY STORE or ADULT VIDEO STORE: A commercial establishment which (a) devotes a significant or substantial portion of its stock-in-trade or interior floor space to; (b) receives a significant or substantial portion of its revenues from; or (c) devotes a significant or substantial portion of its advertising expenditures to the promotion of: the sale, rental or viewing (for any form of consideration) of books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides, or other visual representations which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas." An establishment may have other principal business purposes that do not involve the offering for sale rental or viewing of materials depicting or describing "specified sexual activities" or "specified anatomical areas", and still be categorized as an adult bookstore, adult novelty store, or adult video store. Such other business purposes will not serve to exempt such establishment from being categorized as an adult bookstore, adult novelty store or adult video store so long as the provisions hereof are otherwise met.

ADULT BUSINESS: An adult arcade, adult bookstore, adult novelty shop, adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, sexual encounter establishment, or nude model studio. The definition of adult businesses shall not include an establishment where a medical practitioner, psychologist, psychiatrist, or similar professional person licensed by the state engages in medically approved and recognized sexual therapy.

ADULT CABARET: A club, restaurant, "pop shop", or similar commercial establishment which features: (a) persons who appear nude or in a state of nudity or semi-nude; (b) live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities", or (c) films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas".

ADULT MOTEL: A motel, hotel or similar commercial establishment which: (a) offers public accommodations for any form of consideration and provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas" and which advertises the availability of this adult type of material by means of a sign visible from the public right-of-way, or by means of any off-premises advertising including but not limited to, newspapers, magazines, pamphlets or leaflets, radio or television, or (b) offers a sleeping room for rent for a period of time less than ten (10) hours; or (c) allows a tenant or occupant to

sub-rent a sleeping room for a time period of less than ten (10) hours.

ADULT MOTION PICTURE THEATER: A commercial establishment where films, motion pictures, video cassettes, slides or similar photographic reproductions depicting or describing "specified sexual activities" or "specified anatomical areas" are regularly shown for any form of consideration.

ADULT THEATER: A theater, concert hall, auditorium, or similar commercial establishment which, for any form or consideration, regularly features persons who appear in a state of nudity or live performances which are characterized by exposure of "specified anatomical areas" or by "specified sexual activities."

EMPLOYEE: A person who works or performs in and/or for an adult business, regardless of whether or not said person is paid a salary, wage or other compensation by the operator of said business.

ESTABLISHMENT of an adult business means and includes any of the following:

(a) The opening or commencement of any such business as a new business;

(b) The conversion of an existing business into an adult businesses;

(c) The addition of an adult business to any other existing adult business; or

(d) The relocation of an adult business.

LICENSING OFFICER: The City Clerk.

MANAGER: An operator, other than a licensee, who is employed by an adult business to act as a manager or supervisor of employees or is otherwise responsible for the operation of the business.

NUDITY or STATE OF NUDITY: (a) the appearance of human bare buttock, anus, male genitals, female genitals, or the areola or nipple of the female breast; or (b) a state of dress which fails to opaquely and fully cover a human buttocks, anus, male or female genitals, pubic region or areola or nipple of the female breast.

NUDE MODEL STUDIO: Any place where a person, who appears in a state of nudity or displays "specified anatomical areas" is provided for money or any form of consideration to be observed, sketched, drawn, painted, sculpted, photographed, or similarly depicted by other persons.

OPERATOR: Includes the owner, permit holder, custodian, manager, operator or person in charge of any permitted or licensed premises.

PEEP BOOTH: A viewing room of less than one hundred fifty (150) square feet of floor space.

PERMITTEE and/or LICENSEE: A person in whose name a permit and/or license to operate an adult business has been issued, as well as the individual listed as an applicant on the application for a permit and/or license.

PERSON: An individual, proprietorship, partnership, corporation, limited liability company, association or other legal entity.

PREMISES or PERMITTED OR LICENSED PREMISES: Any premises that requires a license and/or permit and that is classified as an adult business.

PRINCIPAL OWNER: Any person owning, directly or beneficially, (a) ten per cent or more of a corporation's equity securities; (b) ten per cent of more of the membership interests in a limited liability company; or (c) in the case of any other legal entity, ten per cent or more of the ownership interests in the entity.

PRIVATE ROOM: A room in an adult motel that is not a peep booth, has a bed and a bath in the room or adjacent room, and is used primarily for lodging.

SEXUAL ENCOUNTER ESTABLISHMENT: A business or commercial establishment, that as one of its primary business purposes, offers, for any form of consideration, a place where two or more persons may congregate, associate, or consort for the purpose of "specified sexual activities" or the exposure of "specified anatomical areas" or activities when one or more of the persons is in a state of nudity or semi-nude. An adult motel will not be classified as a sexual encounter establishment by virtue of the fact that it offers private rooms for rent.

SEMI-NUDE: A state of dress in which clothing covers no more than the genitals, pubic region, and areolae of the female breast, as well as portions of the body covered by supporting straps or devices.

SPECIFIED ANATOMICAL AREAS: (a) Less than completely and opaquely covered human genitals, pubic region, buttocks, anus, or female breast below a point immediately above the top of the areolae; or (b) human

male genitals in a discernibly turgid state, even if completely and opaquely covered.

SPECIFIED CRIMINAL ACTS: Sexual crimes against children, sexual abuse, rape or crimes connected with another adult business, including, but not limited to, distribution of obscenity, prostitution, pandering, or tax violations;

SPECIFIED SEXUAL ACTIVITIES: (a) The fondling or other intentional touching of human genitals, pubic region, buttocks, anus, or female breasts; (b) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy; (c) Masturbation, actual or stimulated; or (d) Human genitals in a state of sexual stimulation, arousal or tumescence; (e) Excretory functions as part of or in connection with any of the activities set forth in subdivisions (a) through (d) of this definition.

TRANSFER OF OWNERSHIP OR CONTROL OF AN ADULT BUSINESS means and includes any of the following:

(a) The sale, lease or sublease of the business;

(b) The transfer of securities which constitute a controlling interest in the business, whether by sale, exchange or similar means;

(c) The establishment of a trust, management arrangement, gift or other similar legal devise which transfers ownership or control of the business, except for transfer by bequest or other operation of law upon the death of a person possessing the ownership or control.

3-14-3: LOCATION OF ADULT BUSINESSES; AMORTIZATION

(A) It shall be unlawful to operate or cause to be operated an adult business in any location in the City except as provided in this Code.

(B) It shall be unlawful to operate or cause to be operated an adult business within 500 feet of:

1. A church;

2. A school or child-care facility;

3. A public park (not including trails);

4. A massage parlor licensed under provisions of the City Code; or

5. A community correctional facility.

(C) It shall be unlawful to cause or permit the operation of an adult business within 1000 feet of another adult business or a massage parlor as defined by Section 12-48.5-103, C.R.S. The distance between any such businesses and those businesses specified in Subsection (B) hereof shall be measured in a straight line, without regard to intervening structures or objects, from the closest exterior wall of the structure in which the adult business is located.

(D) It shall be unlawful to cause or permit the operation or maintenance of more than one adult business in the same building, structure or portion thereof.

(E) Any adult businesses lawfully operating on the effective date of this Chapter that is in violation Subsections (B) through (D) will be permitted to continue for a period six months from the effective date hereof. However,

the zoning Administrator may grant an extension of time during which an adult business in violation of Subsections (B) through (D) will be permitted to continue upon a showing that the owner of the business has not had a reasonable time to recover the initial financial investment in the business. No such extension of time shall be for a period greater than that reasonably necessary for the owner of the business to recover his/her initial financial investment in the business. An adult business in violation of Subsections (B) through (D) may continue during such extended period, unless the business is sooner terminated for any reason or voluntarily discontinued for a period of thirty (30) days or more. Such business shall not be enlarged, extended or altered except that the business may be brought into compliance with this Chapter. If two (2) or more adult businesses within 1,000 feet of one another and otherwise in a permissible location, the adult business which was first established and continually operating at the particular location will be deemed to be in compliance with Subsections (B) through (D), and the later established business(es) will be deemed to be in violation of Subsections (B) through (D).

(F) An adult business lawfully operating is not rendered a nonconforming use by the subsequent location of a church, school, child-care facility, public park, residential district, or a residential lot within 500 feet of the adult business; however, if the adult business ceases operation for a period of one hundred eighty days or more regardless of any intent to resume operation, it may not recommence operation in that location.

3-14-4: LICENSE REQUIRED – FEE

(A) No person shall conduct an adult business without first having obtained an annual Adult Business License.

(B) Applicants for an annual Adult Business License shall pay a license fee of five hundred dollars.

(C) In the event an application for an adult business is withdrawn or denied, the license fee shall not be refunded to the applicant.

3-14-5: LICENSE APPLICATION

(A) All applicants for an adult business license shall file an application for such license with the City Clerk on forms to be provided by the Clerk. Each principal owner and all managers and employees shall be named in the application form, and each of them shall be photographed and fingerprinted by the City's Police Department.

(B) The completed application shall contain the following information and shall be accompanied by the following documents:

1. If the applicant is:

   (i) an individual, the individual shall state his/her legal name and any aliases and submit satisfactory proof that he is twenty-one years of age;

   (ii) a partnership, the partnership shall state its complete name, and the names of all partners, whether the partnership is general or limited, and a copy of the partnership agreement, if any;

(iii) a corporation, the corporation shall state its complete name, the date of its incorporation, evidence that the corporation is in good standing under the statutes of the State of Colorado, or in the case of a foreign corporation, evidence that it is currently authorized to do business in the State of Colorado, the names and capacity of all officers, directors and principal stockholders, and the name of the registered corporate agent and the address of the registered office for service of process.

2. Whether the applicant or any other individual listed under Subsection (A) hereof had worked under or had had a previous adult business license under this Chapter or other adult business or adult entertainment ordinance from another state, city or county denied, suspended or revoked, including the name and location of the adult business for which the permit was denied, suspended or revoked, as well as the date of the denial, suspension or revocation.

3. Whether the applicant or any other individual listed under Subsection (A) hereof holds any other licenses under this Chapter or other similar adult business ordinance from another city, county or state and, if so, the names and locations of such other permitted business.

4. The location of the proposed adult business, including a legal description of the property, street address, and telephone number(s), if any.

5. Proof of the applicant's right to possession of the premises wherein the adult business is proposed to be conducted.

6. The applicant's, or any other individuals listed pursuant to Subsection (A), mailing address and residential address.

7. The driver's license number, social security number and/or his/her federally issued tax identification number for the individuals listed in Subsection (A).

8. A floor plan of the proposed licensed premises which specifies the location and dimensions of any manager's station and demonstrates that there is an unobstructed view from at least one of the managers' stations of every area of the premises to which any patron is permitted access for any purpose, excluding restrooms. The proposed floor plan shall designate those rooms or other areas of the premises where patrons are not permitted and shall also designate the use of each room or other area of the premises. The proposed floor plan need not be professionally prepared but must be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six inches. The diagram shall designate the place where the license will be conspicuously posted and the location of any proposed stage. A floor plan is not required of the licensed premises of an adult motion picture theater.

9. A current certificate drawing prepared, within thirty days prior to the application, by a land surveyor depicting the property lines and the structures containing any adult business or massage parlor within 1000 feet of the closest exterior wall of the structure in which the applicant's business is proposed to be located and depicting the property line of any church, school, child care facility, public park, residential zone district, or residential lot within 500 feet from the closest exterior wall of the structure in which the applicant's business is proposed to be located.

10. A written statement from the City's zoning official that the proposed location of such adult business

complies with the locational requirements of this Chapter.

11. Whether the applicant or any of the other individuals listed pursuant to Subsection A have been convicted of a specified criminal act within the times set forth in Section 3-14-8(A)(8) and, if so, the specified criminal act involved, the date of conviction and the place of conviction.

(C) If the applicant is an individual, he/she must sign the application for a license. If the applicant is other than [an] individual, each principal owner must sign the application for a license.

(D) The City Clerk shall not accept any application that is not complete in every detail. If an omission or error is discovered by the City Clerk, the application will be returned to the applicant for completion or correction without further action by the City Clerk. Any application rejected due to an omission or error shall be refiled only when the omission or error has been remedied. For the purposes of this Chapter, the date the City Clerk accepts an application which is complete in every detail shall be the date the application is filed with the City Clerk.

(E) In the event that the City Clerk determines that the applicant has improperly completed the application, he/she shall promptly notify the applicant of such fact and allow the applicant thirty (30) days to properly complete the application. The time period for granting or denying a license shall be stayed during the period in which the applicant is allowed an opportunity to properly complete the application.

(F) Applicants for a license under this Chapter shall have a continuing duty to promptly supplement application information required by this section in the event that said information changes in any way from what is stated on the application. The failure to comply with said continuing duty within thirty days from the date of such change, by supplementing the application on file with the City Clerk, shall be grounds for the suspension or revocation of an adult business license.

3-14-6: APPLICATION FEE

Each applicant for a new license or as specified in §3-14-12(B), whether an individual, partnership, or corporation, shall pay an application fee of one hundred fifty dollars at the time or the filing of an application. Such application fee shall be nonrefundable.

3-14-7: INVESTIGATION

On receipt of a properly completed application, together with all information required in connection therewith, fingerprints and photographs, and the payment of the application and license fees, the City Clerk shall transmit the application to the City's Police Department for an investigation of the background of each individual applicant, employee, the partners of a partnership, or the officers, directors, and holders of the stock of a corporation. Each applicant shall pay a nonrefundable investigation fee at the time the application is filed in the amount then charged by the Colorado Department of Public Safety for each person who will be investigated. The investigation conducted by the Police Department shall be sufficient to verify the accuracy of all the information required by Section 3-14-5.

3-14-8: APPROVAL/DENIAL OF LICENSE

(A) The application of any applicant shall be approved or denied by the City Clerk within thirty days of the date the application is filed with the City Clerk. The City Clerk shall deny a license if:

1. The applicant is under the age of twenty-one years;

2. The applicant has made a false statement upon the application or gave false information in connection with an application.

3. The applicant or any holder of any class of stock, or a director, officer, partner, or principal of the applicant has had an adult business license revoked or suspended anywhere within the State of Colorado within one year prior to the application;

4. The applicant has operated an adult business which has determined to be a public nuisance under state law or this Code within one year prior to the application;

5. A corporate applicant is not in good standing or authorized to do business in the State of Colorado; or

6. The applicant is overdue in the payment to the City of taxes, fees, fines, or penalties assessed against him/her or imposed against him/her in relation to an adult business.

7. The applicant has not obtained required sales tax licenses.

8. The applicant has been convicted of a specified criminal act.

(B) In the event that the City Clerk denies a license, he/she shall make written findings of fact stating the

reasons for the denial and a copy of such decision shall be sent by certified mail to the address shown in the application within ten days after his/her denial. An applicant shall have the right to a hearing before the City Manager as set forth in Section 3-14-11(C). A written request for such hearing shall be made to the City Manager within ten days of the date of the denial of the license by the City Clerk. This hearing shall be held within 30 days and shall follow all the relevant procedures set forth for a suspension or revocation of a license contained in Section 3-14-11(C) herein.

1. At the hearing referred to above, the City Manager shall hear such statements and consider such evidence as the Police Department or other enforcement officers, the applicant, or other party in interest, or any other witness shall offer which is relevant to the denial of the license application by the City Clerk. In such cases where specified criminal acts are in issue, the provisions of C.R.S. §24-5-101 shall control.

2. If the City Manager determines that the applicant is ineligible for a license per Subsection (A) hereof, he/she shall issue an order sustaining the City Clerk's denial of the application, within twenty days after the hearing is concluded, based on findings of fact. A copy of the order shall be mailed to or be served on the applicant at the address on the application.

3. The order of the City Manager made pursuant to paragraph 2 above shall be a final decision and may be appealed to the District Court pursuant to Colorado Rule of Civil Procedure 106(a)(4). Failure of an applicant to timely follow the limits specified above constitutes a waiver by him/her of any right he/she may otherwise have to contest the denial of his/her license application.

(C) No license shall be issued by the City Clerk after approval of any application until the building in which the business is to be conducted is ready for occupancy with such furniture, fixtures, and equipment in place as are necessary to comply with the provisions of this Chapter, and then only after inspection of the premises has been made by the City's Police and Building Inspection Departments to determine that the applicant has complied with the plans and specifications submitted upon application. Such inspection of the premises shall be made within ten days after the City Clerk receives written notification from the applicant that premises are in compliance with the submitted plans and specifications. If the licensed location has been inactive, without good cause, for at least one year, or if the building has not been constructed and placed in operation within two years after approval or the license application, or construction of the building has not commenced within one year after such approval, the City Clerk, in his/her discretion, may revoke or elect not to issue or renew the license.

3-14-9: TERM OF THE LICENSE

All licenses granted pursuant to this Chapter shall be for a term of one year. Said term shall commence on January 1st of each year and terminate upon December 31 of the same year. Applications for a license filed at any other time during the year shall be treated the same as if they were filed January 1st of that year and shall terminate on December 31 of that same year, and no proration shall be permitted.

3-14-10: LICENSE RENEWAL

Renewal of an existing license granted pursuant to this Chapter may be had by payment of the annual licensing fee and filing of a renewal application with

the City Clerk not less than forty-five days prior to the date of expiration. The City Clerk may waive, for good cause shown, this filing time requirement.

3-14-11: SUSPENSION OR REVOCATION OF LICENSE.

(A) The City Manager may suspend a license for a period not to exceed six months or revoke any license granted pursuant to this Chapter upon a finding of any of the following facts:

1. That repeated disturbances of the public peace have occurred within the licensed establishment or upon any parking areas, sidewalks, access ways or grounds within the neighborhood of the licensed establishment involving patrons, employees or the licensee;

2. That the licensee or any employees thereof have offered for sale or knowingly allowed to be consumed or possessed upon the licensed premises, or upon any parking areas, sidewalks, walkways, access ways or grounds immediately adjacent to the licensed premises, narcotics, dangerous drugs or fermented malt, malt, vinous or spirituous beverages;

3. That the licensee or manager is not upon the licensed premises at all times that adult entertainment is being provided;

4. That adult entertainment was offered at the licensed establishment during hours prohibited by Section 3-14-14.

5. That the licensee, manager, or employee has allowed or has done nothing to prevent patrons from engaging in public displays of indecency in violation of state law or Sections 6-4-25 or 6-4-7 of this Code or has allowed patrons or employees to engage in acts of

prostitution or negotiations for acts of prostitution within the licensed establishment or upon any parking areas, sidewalks, access ways, or grounds immediately adjacent to the licensed establishment, when the licensee, manager, or employee knew or should have known such displays or acts were taking place;

6. That the licensee or manager made a false statement or gave false information in connection with an application for a license or a renewal of a license;

7. That the licensee, manager, or employee violated or permitted a violation of any provisions of this Chapter including the standards of conduct set forth in Section 3-14-15 herein;

8. That a manager or employee of the licensed establishment is under the age of twenty-one years;

9. That the licensee, in the case of a corporation, is not in good standing or authorized to do business in the State of Colorado;

10. That the licensee or an employee knowingly operated any aspect or facilities of the adult business during a period of time when the adult business license was suspended;

11. That the licensee is delinquent in the payment to the City or State for any taxes or fees past due;

12. That the licensee, manager, or employe has knowingly allowed any act of sexual intercourse, sodomy, oral copulation, or masturbation to occur within the licensed premises; or

13. That the licensee, manager, or employee has been convicted of a specified criminal act.

(B) Nothing in this Chapter shall prohibit the City from taking any other enforcement action provided for by this Code, the laws of the state, or of the United States.

(C) A licensee shall be entitled to a hearing before the City Manager if the City seeks to suspend or revoke his/her license based on a violation of this Chapter.

1. When there is probable cause to believe that a licensee has violated or permitted a violation of this ordinance to occur in or near the licensed establishment, the Police Department may file a written complaint with City Manager setting forth the circumstances of the violation.

2. City Manager shall provide a copy of the complaint to the licensee, together with notice to appear before the City Manager for the purpose of a hearing on a specified date to show cause why the licensee's license should not be suspended or revoked.

3. In such cases where specified criminal acts are in issue, the provisions of C.R.S. §24-5-101 shall control.

4. At the hearing referred to above, the City Manager shall hear such statements and consider such evidence as the Police Department, or other enforcement, officers, the owner, occupant, lessee, or other party in interest, or any other witness shall offer which is relevant to the violation alleged in the complaint. The City Manager shall make findings of fact from the statements and evidence offered as to whether the violation occurred in or near the licensed establishment. If the City Manager determines that a violation did occur he/she shall issue an order suspending or revoking the license, within 20 days after the hearing is concluded, based on the findings of fact. A copy of the order shall be mailed to or served on the licensee at the address on the license.

5. The order of the City Manager made pursuant to subsection 3 above shall be a final decision and may be appealed to the District Court pursuant to Colorado Rules of Civil Procedure 106(a)(4). Failure of a licensee to timely appeal said order constitutes a waiver by him/her of any right he/she may otherwise have to contest the suspension or revocation of his/her license.

6. The City Manager shall have the power to administer oaths, issue subpoenas, and when necessary, grant continuances. Subpoenas may be issued to require the presence of persons and production of papers, books and records necessary to the determination of any hearing which the City Manager conducts. It is unlawful for any person to fail to comply with any subpoena issued by the City Manager. A subpoena shall be served in the same manner as a subpoena issued by the District Court of the state. Upon failure of any witness to comply with such subpoena, the City Attorney shall:

(i) Petition any judge of the Municipal Court of the City, setting forth that due notice has been given of the time and place of attendance of the witness and the service of the subpoena, that the court, after hearing evidence in support of or contrary to the petition, enter its order compelling the witness to attend and testify or produce books, records or other evidence, under penalty of punishment for contempt in case of willful failure to comply with such order of court; or

(ii) Petition the appropriate District Court setting forth that due notice has been given of the time and place of attendance of the witness and the service of the subpoena, that the court, after hearing evidence in support of or contrary to the petition, enter its order as in other civil actions,

compelling the witness to attend and testify or produce books, records, or other evidence, under penalty of punishment for contempt in case of willful failure to comply with such order of court.

(D) In the event of suspension, revocation, or cessation of business, no portion of the license fee, application fee or investigative fee shall be refunded.

(E) When the City Manager revokes a license, the revocation shall continue for one year, and the licensee shall not be issued an adult business license for one year from the date the revocation became effective.

3-14-12: DISPLAY - TRANSFERABILITY - CHANGE OF OWNERSHIP

(A) Any adult business license issued pursuant to the terms of this Chapter shall be prominently displayed at all times upon the premises for which the license was issued in accordance with §3-14-5(B)(8).

(B) Licenses issued under this Chapter shall not be transferable except as provided herein. Any transfer or ownership or control by a licensee holding an adult business license shall result in termination of the license unless such licensee within thirty days prior to any such transfer files a written notice of such transfer accompanied by the application fee and an investigation fee as required by Sections 3-14-6 and 3-14-7. Any such transfer shall be reported on forms provided by the City Clerk and shall require the names of all new principal owners and any information as required by Section 3-14-5. Approval or denial by the City Clerk of such transfer shall be upon the same terms as provided for in this Chapter for the approval or denial of an adult business license.

(C) When a license has been issued to a husband and wife or to general or limited partners, the death of a spouse or partner shall not require the surviving spouse or partner to obtain a new license. All rights and privileges granted under the original license shall continue in full force and effect as to such survivors for the balance of the license.

(D) Each license issued under this Chapter is separate and distinct, and no person shall exercise any of the privileges granted under any license other than that which he holds. A separate license shall be issued for each specific adult business and each geographical location.

3-14-13: MANAGER – CHANGE OF MANAGER.

(A) A registered manager shall be on the premises of an adult business at all times that adult entertainment is being provided. It shall be unlawful for any person to work as a manager of an adult business without first registering with the City Clerk. The registration form shall require the applicant to provide his/her legal name and any aliases, home address, telephone number, and satisfactory proof that he is twenty-one years of age.

(B) In the event a licensee changes the manager or any employees of an adult business, the licensee shall report such change and register the new manager or any employees on forms provided by the City Clerk within ten days of such change. Any new employee or manager shall pay the investigation fee specified in Section 3-14-7 herein and shall be subject to approval or denial in accordance with the provisions of Section 3-14-8.

3-14-14: HOURS OF OPERATION. It shall be unlawful for a sexually oriented business to be open

for business or for the licensee or any employee of a licensee to allow patrons upon the licensed premises from 12:00 a.m. until 8: a.m.

3-14-15: STANDARDS OF CONDUCT.

(A) The following standards of conduct must be adhered to by employees of any adult business which offers, conducts, or maintains live adult entertainment:

1. No employee or entertainer mingling with the patrons or serving food or beverages shall be unclothed or in such attire, costume or clothing so as to expose to view any specified anatomical area.

2. No employee or entertainer shall encourage or knowingly permit any person upon the premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

3. No employee or entertainer shall wear or use any device or covering exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

4. a. No employee or entertainer shall be unclothed or in such attire, costume, or clothing so as to expose any portion of the specified anatomical area except upon a stage at least eighteen inches above the immediate floor level and removed at least six feet from the nearest patron or behind a solid, uninterrupted physical barrier which completely separates the entertainer from any patrons. This barrier must be a minimum of ¼ inch thick and have no openings between the entertainer and any patrons. The stage shall be fixed and immovable.

b. No employee or entertainer shall perform while nude or semi-nude any obscene acts or obscene acts which simulate specified sexual activities.

5. No employee or entertainer shall use artificial devices or inanimate objects to depict any of the prohibited activities described in this section.

6. There shall be posted and conspicuously displayed in every area offering adult entertainment a list of food and beverage prices.

7. No adult entertainment use shall be located within any premises which is licensed for the retail sale of 3.2% beer, malt, vinous, or spirituous liquor, as such terms are defined in Title 12, Articles 46 and 47, C.R.S.

8. It shall be unlawful to permit the consumption of 3.2% beer or other alcoholic beverages within the same premises as an adult entertainment use.

9. Any tips for entertainers shall be placed by a patron into a tip box which is permanently affixed in the adult business and no tip may be handed directly to an entertainer. A licensee that desires to provide for such tips from its patrons shall establish one or more containers to receive tips. Any physical contact between a patron and an entertainer is strictly prohibited.

10. An adult business that provides tip boxes shall conspicuously display in the common area of the premises one or more signs in letters at least one (1) inch high to read as follows:

ADULT ENTERTAINMENT IS REGULATED BY THE CITY OF LITTLETON

Any tips are to be placed in tip box and not handed directly to the entertainer. Any physical contact between the patron and the entertainer is prohibited by law. Violators face maximum penalties of $1,000 and/or one year in jail.

11. No adult entertainment occurring on the premises shall be visible at any time from outside of the premises.

(B) Any licensee who offers, conducts, or maintains live adult entertainment or an adult arcade which exhibits in a peep booth, a film, videocassette, or other video reproduction, shall comply with the following requirements in addition to those set forth in Subsection (A) hereof.

1. It is the duty of the licensee of the premises to ensure that at least one employee is on duty and situated in each manager's station at all times that any patron is present inside the premises.

2. It is the duty of the licensee and manager of the premises to ensure that any doors to public areas on the premises remain unlocked during business hours.

3. The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's station of every area of the premises to which any patron is permitted access for any purpose excluding restrooms. Restrooms may not contain video reproduction equipment or other forms of adult entertainment. If the premises have two or more manager's stations designated, then the interior of the premises shall be configured in such a manner

that there is an unobstructed view of each area of the premises to which any patron is permitted access for any purpose excluding restrooms from at least one of the manager's stations. The view required in this subsection must be by direct line of sight from the manager's station. A manager's stations may not exceed thirty-two square feet of floor area.

4. No alteration to the configuration or location of an adult business may be made without the prior written approval of the Zoning Official.

5. It shall be the duty of the licensee, and it shall also be the duty of any agents and employees present in the premises to ensure that the view area specified in paragraph (3) hereof remains unobstructed by any doors, curtains, drapes, walls, merchandise, display racks or other materials at all times and to ensure that no patron is permitted access to any area of the premises which has been designated as an area in which patrons will not be permitted in the license application filed pursuant to this Chapter.

6. No peep booth may be occupied by more than one person at any one time.

7. Peep booths must be separated from other peep booths by a solid, uninterrupted physical divider which is a minimum of ¼ inch thick and serves to prevent physical contact between patrons.

3-14-16: AGE RESTRICTIONS Admission to adult businesses is restricted to persons of the age of twenty one years or more during hours adult entertainment is being presented. This minimum age limitation also applies to any employees, agents, servants, performers or independent contractors working on the premises.

3-14-17: LIGHTING REQUIREMENTS

(A) All off-street parking areas and premise entries of adult businesses shall be illuminated from dusk to closing hours of operation with a lighting system which provides an average maintained horizontal illumination of one (1) foot candle of light on all parking surfaces and/or walkways. This required lighting level is to help ensure the personal safety of patrons and employees and to reduce the incidence of vandalism and other criminal conduct.

(B) The premises of all adult businesses, except adult motion picture theaters, shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access to provide an illumination of not less than two foot candle of light as measured at the floor level.

(C) Adult motion picture theaters shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access to provide an illumination of not less than one foot candle of light as measured at the floor level.

3-14-18: RIGHT OF ENTRY. The application for an adult business license shall constitute consent of the licensee and his/her agents or employees to permit the City's Police Department or any other agent of the City to conduct routine inspections of any licensed adult business during the hours the establishment is conducting business.

3-14-19: EXEMPTIONS GENERALLY. It is an affirmative defense to prosecution under this Chapter if a person appearing in a state of nudity or semi-nude did so in a modeling class operated:

(A) by a proprietary school, licensed by the State of Colorado; a college, junior college, or university supported entirely or partly by taxation;

(B) by a private college or university which maintains and operates educational programs in which credits are transferable to a college, junior college, or university supported entirely or partly by taxation; or

(C) in a structure:

1. which has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available for viewing;

2. where, in order to participate in a class a student must enroll at least three days in advance of the class; and

3. where no more than one nude model is on the premises at any one time.

Section 8: Severability. If any part, section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid, such invalidity shall not affect the validity of the remaining sections of this ordinance. The City Council hereby declares that it would have passed this ordinance, including each part, section, subsection, sentence, clause or phrase hereof, irrespective of the fact that one or more parts, sections, subsections, sentences, clauses or phrases may be declared invalid.

Section 9: Repealer. All ordinances or resolutions, or parts thereof, in conflict with this ordinance are hereby repealed, provided that this repealer shall not repeal the repealer clauses of such ordinance nor revive any ordinance thereby.

INTRODUCED AS A BILL at a regularly scheduled meeting of the City Council of the City of Littleton on the 20th day of July, 1993, passed on first reading by a vote of 7 FOR and 0 AGAINST; and ordered published in full in the Littleton Independent of July 22, 1993.

PUBLIC HEARING on the Ordinance to take place on the 3rd day of August, 1993, in the Council Chambers, Littleton Center, 2255 West Berry Avenue, Littleton, Colorado, at the hour of 7:30 p.m., or as soon thereafter as it may be heard.

PASSED on second and final reading, following public hearing, by a vote of 6 FOR and 0 AGAINST on the 3rd day of August, 1993, and ordered published by reference only in the Littleton Independent on the 5th day of August, 1993.

ATTEST:

/s/ Janice Owens
CITY CLERK

/s/ Susan M. Thornton
PRESIDENT OF CITY COUNCIL

APPROVED AS TO FORM:

/s/ Barry Segal
CITY ATTORNEY

CITY OF LITTLETON, COLORADO

ORDINANCE NO. 13

Series of 2001

INTRODUCED BY COUNCILMEMBERS: Mulvey and Ostermiller

AN ORDINANCE OF THE CITY OF LITTLETON, COLORADO, TO AMEND CHAPTER 14 OF TITLE 3 OF THE LITTLETON CITY CODE DEALING WITH ADULT ENTERTAINMENT ESTABLISHMENTS.

WHEREAS, certain Court cases have been decided regarding adult entertainment establishments since the City's adoption of its Adult Entertainment Ordinance and said Ordinance should be amended to avoid any legal challenges based on those cases; and

WHEREAS, an ambiguity has been determined to exist in the provisions dealing with appellate rights of applicants.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LITTLETON, COLORADO, THAT:

Section 1: Section 3-14-2 definition of "Specified Criminal Acts" is amended to read as follows:

SPECIFIED CRIMINAL ACTS:

Sexual crimes against children sexual abuse, rape or crimes connected with another adult business, including distribution of obscenity, prostitution, pandering or tax violation.

Section 2: Section 3-14-5(A) is amended to read as follows:

3-14-5: LICENSE APPLICATION:

(A) All applicants for an adult business license shall file an application for such license with the City Clerk on forms to be provided by the Clerk. Each principal owner and all managers and employees shall be named in the application form. Each manager, general partner, and in the case of a corporate applicant, the president of the corporation, shall be photographed and fingerprinted by the City's Police Department.

Section 3: Section 3-14-5(b) 1.(c) is amended to read:

(B) 1. (c) A corporation, the corporation shall state its complete name, the date of its incorporation, evidence that the corporation is in good standing under the statutes of the State, or in the case of a foreign corporation, evidence that it is currently authorized to do business in the State, the names and capacity of all officers, directors and principal owners, and the name of the registered corporate agent and the address of the registered office for service of process;

Section 4: Section 3-14-5(B) 1. is amended by addition of a new Subsection (d)

(d) A limited liability company shall state its complete name, the date of filing of the articles of organization and operating agreement, the names of all managers and members.

Section 5: Section 3-14-5(c) is amended to read:

(C) If the applicant is an individual, he/she must sign the application for a license. If the applicant is a corporation it must be signed by the President or Vice President and attested to by the Secretary or assistant Secretary. If the applicant is a general or

limited partnership it must be signed by a General Partner. If the applicant is a limited liability company it must be signed by the Manager.

Section 6: The first paragraph of Section 3-14-8 (B) is hereby amended as follows:

(B) In the event that the City Clerk denies a license, he/she shall make written findings of fact stating the reasons for the denial, and a copy of such decision shall be sent by certified mail to the address shown in the application within ten (10) days after denial. An applicant shall have the right to a hearing before the City Manager as set forth in subsection 3-14-11 (C) of this Chapter. A written request for such hearing shall be made to the City Manager within twenty (20) days of the date of the denial of the license by the City Clerk. This hearing shall be held within thirty (30) days from the date a timely request for hearing is received by the City Manager and shall follow all the relevant procedures set forth for a suspension or revocation of a license contained in subsection 3-14-11 (C) of this Chapter.

Section 7: Section 3-14-16 is amended to read as follows:

3-14-16: AGE RESTRICTIONS:

(A) Admission to adult businesses, other than those providing live performances which are characterized by the exposure of "specified anatomical areas," or by "specified sexual activities," is restricted to persons of the age of eighteen (18) years or more. This minimum age limitation also applies to any employees, agents servants, performers or independent contractors working on the premises. (Ord. 27, Series of 1993)

(B) Admission to adult businesses providing live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities" is restricted to persons of the age of twenty one (21) years or more during the hours when such live performances occur. This minimum age limitation also applies to any employees, agents, servants, or independent contractors working on the premises, provided however, the minimum age for performers shall be eighteen (18) years or more.

Section 8: Severability. If any part, section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid, such invalidity shall not affect the validity of the remaining sections of this ordinance. The City Council hereby declares that it would have passed this ordinance, including each part, section, subsection, sentence, clause or phrase hereof, irrespective of the fact that one or more parts, sections, subsections, sentences, clauses or phrases may be declared invalid.

Section 9: Repealer. All ordinances or resolutions, or parts thereof, in conflict with this ordinance are hereby repealed, provided that this repealer shall not repeal the repealer clauses of such ordinance nor revive any ordinance thereby.

INTRODUCED AS A BILL at a regularly scheduled meeting of the City Council of the City of Littleton on the 5th day of June, 2001, passed on first reading by a vote of 7 FOR and 0 AGAINST; and ordered published in full in the Littleton Independent of June 7, 2001.

PUBLIC HEARING on the Ordinance to take place on the 19th day of June, 2001, in the Council Chambers, Littleton Center, 2255 West Berry Avenue, Littleton,

Colorado, at the hour of 7:00 p.m., or as soon thereafter as it may be heard.

PASSED on second and final reading, following public hearing, by a vote of 5 FOR and 0 AGAINST on the 19th day of June, 2001, and ordered published by reference only in the Littleton Independent on the 21st day of June, 2001.

ATTEST:

/s/ Julie Bower
CITY CLERK

APPROVED AS TO FORM:

/s/ Larry W. Berkowitz
CITY ATTORNEY

/s/ Susan M. Thornton
PRESIDENT OF CITY COUNCIL

Case No. 01-1220

UNTIED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Z.J. GIFTS D-4, L.L.C., a Colorado Limited Liability Company d/b/a CHRISTAL'S,

Plaintiff-Appellant,

v.

THE CITY OF LITTLETON,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

THE HONORABLE EDWARD NOTTINGHAM
UNITED STATES DISTRICT JUDGE
District Court Case No. 99-N-1696

DEFENDANT-APPELLEE'S PETITION FOR REHEARING EN BANC

Opinion decided November 18, 2002 by the Honorable Circuit Judges Briscoe, Brorby, and Lucero

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* * *

I. STATEMENT PURSUANT TO FED.R.APP.P. 35(b)(1)

In accordance with Fed.R.App.P. 35(b)(1)(A) and (B), Defendant-Appellee (hereinafter "Littleton") respectfully requests that its Petition for Rehearing En Banc be granted for the following reasons:

(A) The recent decision of the Panel is discordant with the United States Supreme Court's decisions in ***Freedman v. Maryland***, 380 U.S. 51, 85 S.Ct. 734 (1965) and ***FW/PBS, Inc. v. City of Dallas***, 493 U.S. 215, 110 S.Ct. 596 (1990).

(B) The recent decision of the Panel involves the following questions of exceptional importance:

(1) Whether prompt judicial review requires prompt access to judicial review or requires a prompt decision on the merits?

(2) Whether this Circuit, as a matter of first impression, should join the First, Fifth, Seventh and Eleventh Circuits, and the Colorado Supreme Court, and hold that prompt judicial review requires only prompt access to judicial review?

(3) If prompt judicial review requires a prompt decision on the merits, what methodologies can municipalities employ to satisfy the requirement in their adult business licensing ordinances?

(4) How can a municipality guarantee a prompt decision from an independent judiciary?

II. STATEMENT OF CASE

In 1993, the City of Littleton enacted an Ordinance adopting Chapter 14 of the Littleton Municipal Code ("the Ordinance") which set forth a variety of zoning and licensing requirements with regard to sexually-oriented businesses operating in Littleton. (Aplt's App. at 149-174; Aplt's App. at 30-52) The Ordinance was enacted under valid police powers of the legislative body of Littleton in accordance with the Untied States and Colorado Constitutions.

After suit was filed, the parties filed cross motions for summary judgment. Following oral argument, the district court issued its *Order and Memorandum of Decision* on March 31, 2001, which granted Littleton's motion for summary judgment in its entirety. On April 27, 2001, Plaintiff-Appellant (hereinafter "Christal's") filed a *Notice of Appeal* with this Court.

Following briefing and oral argument, the Honorable Judges, Briscoe, Brorby, and Lucero, issued an opinion which affirmed in part and reversed in part the district court's order. The panel affirmed the district court's finding that Christal's is an adult business and that the Ordinance's use of the terms "significant or substantial" in defining sexually-oriented businesses was constitutional. The panel also affirmed the district court's holding that Littleton's locational restrictions were constitutional.

With respect to the issue of prior restraint, and more specifically the issue of what constitutes prompt judicial review, the panel reversed the district court by holding

that prompt judicial review requires a prompt judicial decision. For the reasons set forth below, Littleton respectfully requests this Court review, *en banc*, the panel's decision of November 18, 2002, regarding the panel's interpretation of prompt judicial review.

III. ARGUMENT

A. The Panel's Decision is Discordant with Freedman v. Maryland and FW/PBS, Inc., v. City of Dallas.

The panel has incorrectly conflated the holdings in ***Freedman*** and ***FW/PBS***, literally resulting in allowing sexually-oriented businesses unfettered operation from legitimate, narrowly tailored, content-neutral governmental regulations. With its decision the panel may well have invalidated most adult business ordinances in this circuit.

Not only is the panel's decision inconsistent with the Supreme Court's rulings in ***Freedman*** and ***FW/PBS***, but it is also contrary to other Supreme Court rulings which recognize the importance of allowing time, place and manner regulations with respect to governing sexually-oriented businesses. ***Young v. American Mini Theatres, Inc.***, 427 U.S. 50, 71, 96 S.Ct. 2440, 2453 *(1976) citing*, ***Berman v. Parker***, 348 U.S. 26, 32-34, 75 S.Ct. 98 (1954); ***City of Renton v. Playtime Theaters, Inc.***, 475 U.S. 41, 47-48, 106 S.Ct. 925, 928-29 (1986)

The concept of prior restraint, as articulated by the court in ***Freedman***, was created to apply to content-based censorship schemes. The ***FW/PBS*** court, as well as its progeny, recognize the significant differences between censorship schemes and licensing schemes.

In a licensing scheme, the court in ***FW/PBS***, recognized a shift with regard to the burden of proceeding with litigation from the governmental entity to the business seeking the license, recognizing that businesses may avail themselves of emergency relief or expedited proceedings. Additionally, ***FW/PBS*** does not mandate that there be a prompt judicial decision; rather, citing directly to ***Freedman***, the plurality held that there must be expeditious judicial review available. ***FW/PBS***. 493 U.S. at 227.

In essence, the panel has expanded the application of inapposite precedent in ***Freedman*** and ***FW/PBS***. By requiring a prompt judicial decision, the panel has shifted the burden of obtaining not only judicial review, but also a decision, on the governing body. As such, the panel's decision is discordant with both ***Freedman*** and ***FW/PBS***.

B. Issues of Exceptional Importance.

1. Contrary to the panel's holding, prompt judicial review requires prompt access to judicial review.

It is axiomatic that Littleton's Ordinance is content-neutral. Applying the court's rationale in ***FW/PBS***, content-neutral regulations contain adequate procedural safeguards when the legislative scheme recognizes that any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained, and expeditious judicial review of that decision must be available. ***FW/PBS***, 493 U.S. at 227.

As noted by the panel, the court was fractured in ***FW/PBS***. A plurality, Justices O'Connor, Stevens and Kennedy, found that two of the ***Freedman*** safeguards were necessary. First that any prior restraint in advance

of a final judicial determination on the merits must not be longer than necessary and the status quo needed to be preserved pending judicial resolution; and second, that there must be the possibility of prompt judicial access available in the event that the license is erroneously denied. Justices White, Scalia and Chief Justice Rehnquist did not apply any of the safeguards set forth in ***Freedman***. Justice[s] Brennan, Marshall and Blackman would have applied all three of the safeguards set forth in ***Freedman***.

The court in ***FW/PBS*** repeatedly refers to the necessity of judicial review being available. In writing for the court, Justice O'Connor refers numerous times to ***Freedman*** in holding that there must be the "possibility of" or "an avenue for" or "an avenue available for" prompt judicial review. She also cites to footnote n.4 in ***Shuttlesworth v. Birmingham***, 394 U.S. 147, 155, 89 S.Ct. 935 (1969), which held that "content-neutral time, place and manner regulations must provide for expeditious judicial review." The panel seems to find that because Justice O'Connor cited to ***Freedman***, she must have meant that a prompt judicial decision was necessitated. The panel's interpretation of Justice O'Connor's opinion in this way is inconsistent with the specific language utilized by Justice O'Connor, and, when applied, it is illogical and contrary to ***Freedman*** and ***FW/PBS***.

In a long paragraph in ***FW/PBS***, Justice O'Connor distinguishes censorship schemes from licensing schemes and at the conclusion of the paragraph, detailing the inherent differences between the two schemes, she states as follows: "[b]ecause of these differences, we conclude that the First Amendment does not require that the city bear the burden of going to court. . . . Limitation on the time

within which the licensor must issue the license as well as the availability of prompt judicial review satisfy the principle that freedoms of expression must be ringed about with adequate bulwarks." ***FW/PBS, Inc. v. Dallas***, 493 U.S. at 230, *citing*, ***Bantam Books, Inc. v. Sullivan***, 372 U.S. 58, 66, 83 S.Ct. 631, 637 (1963).

As found by the district court, Littleton's 30-day provision in the Ordinance specifies a brief period of time to either grant or deny a license. ***TK's Video, Inc. v. Denton County, Texas***, 24 F.3d 705, 708 (5th Cir. 1994) [upholding sixty (60) day period to make licensing decision]; ***Wolff v. City of Monticello***, 803 F.Supp. 1568, 1574 (D. Minn 1992) [upholding ninety-day period to make licensing decision]. In relevant part, Littleton's ordinance maintains the status quo as to an applicant seeking a new license because the business is non-operational until such time as it becomes licensed, and it is incongruous to require that a municipality allow operation pending review. ***City of Colorado Springs v. 2354, Inc.***, 896 P.2d 272, 284 (Colo. 1995).

For the reasons set forth below, Littleton cannot guarantee a prompt judicial decision. If a city must stay the enforcement of its license denial until a court of law has validated that denial, the business has no incentive to vigorously pursue any form of judicial review. This would ultimately result in shifting the burden back to the governing body to initiate and pursue the litigation. This is contrary to the court's holding in ***FW/PBS*** and is only necessitated within the confines of a censorship scheme as set forth in ***Freedman***.

Although the panel did not seem to ascribe much importance to distinguishing between a licensing scheme

and a censorship scheme, Justice O'Connor detailed the rationale for treating licensing schemes differently. She reasoned that within the context of a licensing scheme, a business should bear the burden of going to court. Justice O'Connor stated:

> The Court in ***Freedman*** also placed the burdens on the censor, because otherwise the motion picture distributor was likely to be deterred from challenging the decision to suppress the speech and, therefore, the censor's decision to suppress was tantamount to complete suppression of the speech. The license applicants under the Dallas scheme have much more at stake than did the motion picture distributor considered in ***Freedman***, where only one film was censored. Because the license is the key to the applicant's obtaining and maintaining the business, there is every incentive for the applicant to pursue a license denial through court.

This pivotal distinction is the crux of the split among the circuits and is at the heart of the flawed reasoning applied by the panel in its ruling.

2. *This Circuit should follow the First, Fifth, Seventh and Eleventh circuits and the Colorado Supreme Court.*

The rationale adopted by the First, Fifth, Seventh and Eleventh Circuits, the Colorado Supreme Court, in ***2354*** and by Judge Matsch in ***Sanclub v. City of Federal Heights*** (98 M 71 decided June 9, 2000) and Judge Nottingham in this case, provides the most reasoned, consistent and practical application for reconciling the difficult

balance between protecting speech and the necessity of regulating sexually-oriented businesses.

Thorough analysis of this issue was undertaken by the Eleventh Circuit in ***Boss Capital, Inc. v. City of Casselberry***, 187 F.3d 1251, 1254 (11th Cir. 1999). That court analyzed the critical distinctions between ***FW/PBS*** and ***Freedman*** and its reasoning and logic are compelling. In ***Boss Capital*** the court noted that prompt judicial resolution was necessitated in ***Freedman*** because ***Freedman*** addressed a censorship scheme which allowed officials to completely ban movies which the officials deemed "obscene." The Court noted that unquestionably, censors pass judgment on the content of speech. Conversely, in a licensing scheme, the court noted that officials look at the ministerial factors associated with licensing procedures which are mundane. The ***Boss Capital*** court cited to the ***FW/PBS*** Court's finding that "licensing officials do not pass judgment on the content of any protected speech; rather, they look at the general qualification of each license applicant, a ministerial function that is not presumptively invalid." ***Boss Capital, Inc.***, 187 F.3d at 1256, quoting ***FW/PBS***, 493 U.S. at 229. Ultimately, the ***Boss Capital*** Court found the foregoing differences appropriately necessitated "treating unlike things differently according to their differences." ***Boss Capital, Inc.***, 187 F.3d at 1256 *quoting*, ***Lyes v. City of Riviera Beach***, 166 F.3d 1332, 1342 (11th Cir. 1999).

The Colorado Supreme Court similarly concluded in its analysis and application of ***FW/PBS*** that Colo. R.Civ.P. 106(a)(4) (Certiorari Review) provisions provide adequate procedural safeguards and an avenue for prompt judicial review so as it minimize suppression of speech. ***2354***, 896

P.2d at 284. The Court in ***2354***, concluded that the procedural safeguards in an ordinance's use of Rule 106 ensured that any impermissible prior restraint on a particular applicant's protected rights of free speech could be remedied promptly by judicial intervention. ***Id***.

The Constitutional sufficiency of requiring judicial access as opposed to a judicial decision is highlighted in Judge Niemeyer's (concurring in part and dissenting in part) opinion in ***11126 Baltimore Boulevard, Inc. v. Prince George's County***, 58 F.3d 988 (4th Cir. 1995).

> On the same day that the county denies an application for a special exception, the applicant may obtain access to the (State Courts). I conclude that this is all that is required by ***FW/PBS, Inc.***, safeguard that expeditious review be available . . . I would interpret that safeguard as requiring only that exit from the executive branch (the administrative permit system) be prompt and that access to the judicial system be immediately available. Since the nature of the safeguard is access to a court, and not the rendering of any given decision of the court, I cannot subscribe to the position that the procedural safeguard requires prompt completion of judicial review any more than it requires a particular result.

11126 Baltimore Boulevard, Inc., 58 F.3d at 1002.

Moreover, as stated in ***Thomas v. Chicago Park District***, 227 F.3d 921 (7th Cir. 2000), 534 U.S. 316, 122 S.Ct. 775 (2002), a licensee also has a right to sue in

Federal District Court and seek a preliminary injunction.[1] The panel failed to discuss federal remedies which are available.

3. The panel failed to set forth any methodologies for municipalities to employ with respect to licensing sexually-oriented businesses.

It has long been held that municipalities have the right to regulate adult businesses. ***Z.J. Gifts D-2 v. City of Aurora***, 136 F.3d 683, 686 (10th Cir. 1998); ***Essence, Inc. v. City of Federal Heights***, 285 F.3d 1272, 1284 (10th Cir. 2002). Part of that regulation generally consists of licensing adult businesses. ***Essence, Inc.***, 285 F.3d at 1289-1290; ***FW/PBS***, 493 U.S. at 225-226.

From a review of case law that concerns adult businesses it can be seen that in the State of Colorado adult licensing ordinances frequently rely on C.R.C.P. 106(a)(4) as a methodology to provide prompt judicial review. While the panel ruled that Rule 106 is insufficient to meet the requirement of a prompt final judicial decision, the panel provided no methodologies which municipalities can employ to satisfy the requirement, nor did the panel explain how municipal governments, exercising legislative powers, can control the sequencing and timing of judicial action. In the absence of a methodology which would satisfy the constitutional standard set by this Circuit, the

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[1] In this case, Christal's sought a preliminary injunction, at approximately the same time it opened for business.

practical result is that adult businesses cannot be required to meet licensing standards.

As will be discussed below, municipalities cannot assure that an independent judiciary will provide an expedited review. The panel apparently felt that the expedited review provisions of C.R.C.P. 106(a)(4)(VIII) and the assumption that a judge hearing a 106 review would recognize an obligation under ***Freedman*** to render a prompt decision were insufficient. The panel also apparently felt that access to judicial review in the context of preliminary injunctive relief was insufficient.

The Circuits which the panel has determined this Circuit should follow provide little guidance. The Sixth Circuit in ***Nightclubs, Inc. v. City of Paducah***, 202 F.3d 884 (6th Cir. 2000), recognized that a municipality has no authority to control the period of time in which a state court will adjudicate a matter. The Sixth Circuit further recognized that a municipality did not even possess the authority to create an avenue for prompt judicial review. The Sixth Circuit did discuss potential solutions. It offered as a suggestion that the cities petition their state legislatures to pass laws that would obligate state courts to resolve such appeals within a short period of time. The municipality could also provide a provisional license. However, that would alter the status quo. In Littleton's case, where its licensing requirements were noted not to involve discretion on the part of the licensing official (Opinion, p. 32, fn. 13), this would require Littleton to provide licenses to a variety of inappropriate applicants who may well be engaged in generating the very secondary

effects the ordinance seeks to avoid.[2] Moreover, such a requirement could also create estoppel type arguments by applicants who may invest significant sums based on provisional licenses.

Given the fact that the panel's decision affects many licensing ordinances, if this Circuit chooses to adopt a prompt judicial review requirement which eliminates C.R.C.P. 106 as an appropriate avenue of judicial review, it is important that methodologies by which cities can comply with the Circuit's standard are articulated.[3]

4. *The Panel's holding fails to take into account the impossibility of a municipality guaranteeing a prompt judicial decision from an independent judiciary*

The panel's holding fails to take into account the Separation of Powers Doctrine within the context of requiring a municipal government guarantee a prompt judicial determination. Article III of the Constitution for the State of Colorado divides the powers of government into three distinct, co-equal branches, and directs that "no

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[2] This could include applicants who have made false statements in the application, applicants who operated an adult business which was determined to be a public nuisance, applicants who have been convicted of sexual crimes against children, sexual abuse, rape or crimes connected with obscenity, prostitution or pandering.

[3] Given the split of authority in the Circuits, and even between this decision and previous district court decisions, and given the availability of 42 U.S.C. §1988 attorney's fees, it is unfair to require cities to either forego adult licensing schemes or experiment at their peril with solutions until the standard is clarified.

person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others." Colo. Const. Art. III.

The Colorado Supreme Court explained in ***In the interest of J.E.S.***, 817 P.2d 508 (Colo. 1991), that the separation of powers doctrine means that [ ] each branch is independent and that they may not interfere with the authority and duties of the other. The Supreme Court said:

> It is an ingrained principle in our government that the three departments of government are coordinate and shall co-operate and complement, and at the same time act as checks and balances against one another *but shall not interfere with or encroach on the authority or within the province of the other* . . . and *[i]n their responsibilities and duties, the courts must have complete independence. . . . It is the genius of our government that the courts must be independent, unfettered, and free from directives, influence, or interference from any extraneous source. (emphasis supplied)*

In the Interest of J.E.S., 817 P.2d at 511 [*Emphasis supplied*].

This panel's decision imposes on municipal governments seeking to regulate sexually oriented business through licensing schemes a fundamentally impossible duty to guarantee judicial action. In requiring additional guarantees and assurances based on ***Freedman*** and ***Baby Tam & Co v. City of Las Vegas***, 154 F.3d 1097 (9th Cir. 1998), the unworkable nature of the prompt determination requirement was not lost on other Courts.

> In demanding this greater assurance, ***Freedman*** and ***Baby Tam & Co.*** may impose an impossible burden on the City. The City lacks the authority to prescribe a specified time when a state or federal judicial officer must render a decision. It has been suggested that the California legislature produce – at least with respect to state judicial officers – but even the state's authority is doubtful.

Mai Lee Le v. City of Citrus Heights, 1999 U.S. Dist. Lexis 13477 at 23 (E.D. Cal. 1999)

In ***Mai Lee Le***, the Legislative Counsel of California opined that a state law requiring a decision within 90 days of a Petition for Writ of Mandamus seeking judicial review of a license denial would likely violate the separation of powers doctrine. But the impossibility of the requirement did not dispose of its potency:

> In sum, ***Freedman*** and ***Baby Tam and Co.*** insist on a procedural safeguard that neither the City nor the State of California may have the power to provide. Nonetheless, those decisions – *however impractical they may be* – are the law. (*emphasis supplied*) ***Id.*** at 24.

The First Amendment does not require such impossible results that plainly infringe on the independence of the judiciary and threaten the very purposes behind the separation of powers doctrine.

In further support of its holding that there is the necessity of a prompt judicial decision, the panel articulated concerns regarding possible bias, bad faith and subterfuge regarding the application process. Littleton's Ordinance does not permit officials unfettered discretion

to deny licenses. This Court should not presume bias, bad faith, or *ultra vires* action on the part of city officials; indeed, the required presumption is that regarding public officials, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their duties." ***United States v. Chemical Foundation, Inc.***, 272 U.S. 1, 14-15, 47 S.Ct. 1 (1926); ***United States v. Armstrong***, 517 U.S. 456, 116 S.Ct. 1480 (1996).

IV. CONCLUSION

For these reasons, Petition requests a rehearing en banc.

V. APPENDIX

The Panel's decision of November 18, 2002 is appended hereto.

Respectfully submitted,

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* * *

Case No. 01-1220

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Z.J. GIFTS D-4, L.L.C., a Colorado Limited Liability Company d/b/a CHRISTAL'S,

Plaintiff-Appellant,

v.

THE CITY OF LITTLETON,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

THE HONORABLE EDWARD NOTTINGHAM
UNITED STATES DISTRICT JUDGE
District Court Case No. 99-N-1696

BRIEF OF AMICUS CURIAE THE COLORADO MUNICIPAL LEAGUE IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR REHEARING EN BANC, WITH CONSENT OF THE PARTIES

Opinion decided November 18, 2002 by the Honorable Circuit Judges Briscoe, Brorby, and Lucero

Colorado Municipal League
Carolynne C. White
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December 13, 2002

COUNSEL FOR AMICUS CURIAE COLORADO MUNICIPAL LEAGUE

COLORADO MUNICIPAL LEAGUE'S CORPORATE DISCLOSURE STATEMENT

The Colorado Municipal League ("CML") is a non-profit, voluntary association of 265 municipalities located throughout the state of Colorado. All of CML's member municipalities are governmental entities, which exempts them from Fed. R. App. P. Rule 26.1. However, CML is registered with the Colorado Secretary of State as a non-profit Colorado corporation in good standing. CML has no parent corporations, and is not owned by any publicly held company.

* * *

INTERESTS OF AMICUS CURIAE

The Colorado Municipal League is a non-profit, voluntary association of 265 municipalities located throughout the state of Colorado (comprising 98.68 percent of the total incorporated state population), including all 82 home rule municipalities, all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less. CML has been appearing as an amicus before the Colorado Court of Appeals, the Colorado Supreme Court and this court for decades in appeals where a significant decision affecting Colorado municipalities is possible.

Many of CML's municipal members have created business licensing schemes for the regulation of adult businesses. These municipalities seek to preserve the health, safety and welfare of their community by regulating such

businesses. CML as an amicus would provide the Court with a statewide municipal perspective on the issues presented in this case, and would assure that the general interest of those other member municipalities is represented. CML members have a great deal at stake in the proper resolution of this matter.

All parties to this case have consented to CML's participation as an *amicus* in this case. FED. R.APP.P. Rule 29(e) provides that an *amicus curiae* must file its brief no later than 7 days after the principal brief of the party being supported. The City of Littleton filed its brief on December 6, 2002. This brief is filed on December 13, 2002. Therefore, it is timely filed and no delay will result from the participation of CML as *amicus curiae*.

ARGUMENT

A rehearing *en banc* is essential because the decision in this case jeopardizes the existing regulatory schemes of many Colorado municipalities.

Many Colorado municipalities regulate adult businesses to protect the health, safety and welfare of their communities, primarily to prevent or limit the demonstrated negative secondary effects such as neighborhood blight, decline of property values, increased crime in general (such as disturbing the peace, public indecency, public drunkenness, and drug-related violations), increased sexually-related crimes (such as rape, prostitution, and sexual assault), noise, litter, traffic congestion, and the spread of sexually transmitted diseases. Many of those municipalities have adopted a licensing scheme for the regulation of adult businesses that is substantially similar to Littleton's, including specifically the reliance on

C.R.C.P. 106(a)(4) to provide "prompt judicial review" once a municipality has rendered a final decision. While an exact count is not possible, a preliminary review of approximately fifty municipal codes reveals at least thirty-two municipalities (or approximately 60%) that rely on a process substantially similar [to] Littleton's. These cities range in size and scope from small rural communities of fewer than 250 persons to large urban communities of more than 275,000.

These ordinances generally require the owner or operator of a business to apply for a license, and to provide certain information on the license application. The ordinance specifies the grounds for denial, revocation or suspension, and provides a process of administrative review of such decisions, within specified timeframes. Although the final decision-maker and deadlines vary, most provide for a hearing and a final decision by the City Manager within thirty days. Upon a final decision of the municipality, the applicant may appeal to the state district court under the procedures set forth in C.R.C.P. 106(a)(4). These ordinances are duly adopted legislative policies of the municipality, enacted under the valid exercise of police power in accordance with the Colorado and United States Constitutions.

As the panel noted, the Circuits are split on the question of whether "prompt judicial review" means that an applicant must have prompt ***access*** to a court, or must receive a prompt ***decision*** from a court.[1] Resolving this

[1] The panel in its decision noted that the 11th, 5th, 7th, and 1st Circuits have found access sufficient; while the 6th, 9th, and 4th have found that a decision is required, and that the circuits were thus split 4

(Continued on following page)

split becomes all the more important when viewed in light of the U.S. Supreme Court's recent decisions, declining to resolve it in **City News and Novelty, Inc., v. City of Waukesha**, 531 U.S. 278 (2001) *cert. Dismissed* and **Thomas v. Chicago Park District**, 227 F.3d 921 (7th Cir. 2000), 534 U.S. 316, 122 S.Ct. 775 (2002).

A rehearing is essential in this case because until a clarification of prompt judicial review is obtained it is impossible for a municipality to design with confidence a constitutional ordinance to validly regulate adult businesses. CML agrees with Defendant-Appellee that, given the split of authority in the Circuits, and even between this decision and previous district court decisions, and given the availability of 42 U.S.C. §1988 attorney's fees, it is unfair to require cities to either forego adult licensing schemes or experiment at their peril with solutions until the standard is clarified.

If the decision of the panel stands, it will be impossible for a municipality to design an adult licensing scheme

to 3. *See Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1256 (11th Cir. 1999); *TK's Video v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994); *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993) (en banc); *Jews for Jesus v. Mass. Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993). See also *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 892-93 (6th Cir. 2000); *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir. 1998); *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988, 1000-01 (4th Cir. 1995). However, as the 5th Circuit noted in *Encore Videos Inc. v. City of San Antonio*, No. 00-51119, slip op. at 12 (W.D. Tex. Oct. 29, 2002) it appears that the 2d Circuit also has found access sufficient. *Beal v. Stern*, 184 F.3d 117, 129 (2d Cir. 1999). Thus the circuits are now actually split 5 to 4, with the 10th Circuit making up the fourth circuit to find that a decision is required.

that provides sufficient prompt judicial review to meet the standard articulated by the court, namely a stated time frame within which a state district court judge must reach a decision.

Other courts have recognized the impossibility of a municipality directing, ordering, or otherwise influencing a district court to render an opinion in a particular case within a time certain. ***Mai Lee Le v. City of Citrus Heights***, 1999 U.S. Dist. Lexis 13477 at 23 (E.D. Cal. 1999). In Colorado, it is highly questionable whether even a legislative amendment by the Colorado General Assembly could achieve this result, given the separation of powers. Nonetheless, the existing opinion suggests that this is the only possible way to render Littleton's ordinance – and by extension, those of numerous other municipalities – constitutional.

Finally, rehearing is necessary because this opinion jeopardizes not only adult business regulatory schemes, but also other municipal licensing schemes with First Amendment or free speech implications that rely on C.R.C.P. 106(a)(4) to provide prompt judicial review. While the particular issue in this case happens to relate to the licensing of adult businesses, the same analysis could apply to invalidate other municipal licensing schemes in which free speech is implicated. For example, many Colorado municipalities have ordinances requiring licenses for placing newspaper boxes in public places. Denial of such a license may be appealed, as with adult business ordinances, to the district court through the procedures outlined in C.R.C.P. 106(a)(4). If a Littleton-style ordinance is constitutionally infirm for failure to provide prompt judicial review in the context of an adult business, it is likely so in the context of a newspaper box.

Newspaper box cases have also been held to have First Amendment implications. See for example, *City of Lakewood v. Plain Dealer Publishing Company*, 486 U.S. 750 (1988).

CONCLUSION

For the foregoing reasons, *amicus curiae* Colorado Municipal League requests that the court grant Defendant-Appellant City of Littleton's Petition for Rehearing En Banc.

Respectfully submitted,

COLORADO MUNICIPAL LEAGUE.

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* * *